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Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1997

CHARLES MAYHEW, SR., CHARLES MAYHEW, JR., THE ESTATE OF AUDREY MAYHEW, and SUNNYVALE PROPERTIES, LTD.,

Petitioners,

v.

THE TOWN OF SUNNYVALE, TEXAS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Texas

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PETITION FOR WRIT OF CERTIORARI

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218 pp

QUESTIONS PRESENTED FOR REVIEW

WHETHER A STATE APPELLATE COURT CAN EVISCERATE THIS COURT'S "SUBSTANTIALLY ADVANCES" TAKING STANDARD BY SIMPLY CHARACTERIZING A *TAKINGS CLAIM* AS A QUESTION OF LAW AND IGNORING THE TRIAL COURT'S FINDINGS OF FACT?

WHETHER A LOCAL GOVERNMENT DENIAL OF AN APPLICATION FOR DEVELOPMENT APPROVAL WHICH SATISFIES EACH CRITERIA FOR DEVELOPMENT APPROVAL VIOLATES PROCEDURAL DUE PROCESS OF LAW ?

PARTIES TO THE PROCEEDING

The parties to this action in the Supreme Court of Texas were Charles Mayhew, Sr., Charles Mayhew, Jr., The Estate of Audrey Mayhew, Sunnyvale Properties, Ltd., and The Town of Sunnyvale.

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OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at 964 S.W.2d 922 (Tex. 1998), and is reproduced as Appendix A (App.). The Supreme Court of Texas' Judgment is reproduced as Appendix B. Petitioners filed a timely petition for reconsideration, and reconsideration was denied on May 8, 1998, Appendix C. The opinions of the District Court of Appeal for the Dallas District are reported at 774 S.W.2d 284 (Tex. App. -- Dallas 1989, writ denied), *cert. denied*, 498 U.S. 1087 (1991), Appendix D, and 905 S.W.2d 234 (Tex. App. -- Dallas 1994), Appendix E, as supplemented on rehearing (Feb. 16, 1995), Appendix F. The Trial Court's February 17, 1992 Judgment is at Appendix G and the Trial Court's Findings of Fact and Conclusions of Law are located at Appendix H. Page references are to the versions in the Appendices.

JURISDICTION

The decision of the Supreme Court of Texas was entered on March 13, 1998. Petitioner filed a timely petition for reconsideration, and reconsideration was denied on May 8, 1998. Appendix B. This petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Title 42 United States Code, § 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioners are the owners of 1,196 acres of vacant land in the Town of Sunnyvale, Texas (the "Town"). The Town is located in the Dallas-Ft. Worth metroplex, only 12 miles from the Central Business District of the City of Dallas. Most of the Town's 10,941 acres of land are vacant and subject to blanket one dwelling unit per acre zoning which was imposed as an interim measure in 1973 because of a septic tank problem in a subdivision. The septic tank problem was subsequently remedied by the installation of sanitary sewers.

Commencing in early 1985, Petitioners worked with Town officials in an attempt to obtain approval for the planned development of its property. Although the Town conceded that Petitioners' application complied with each and every standard and requirement for planned development approval, the Town, after more than two years of negotiations and public review, denied the application and left blanket one unit per acre zoning in place for all of Petitioners' property.

The Petitioners then filed this action, pursuant to 42 U.S.C § 1983, in the District Court, Dallas County, Texas (the "trial court") alleging, *inter alia*, that the Town's denial of the application fails to "substantially advance a legitimate public

interest" thereby constituting a taking without payment of just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The complaint additionally alleged that the Town denied the Petitioners procedural due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and that the actions were taken under color of state law.[1]

Initially, the trial court entered summary judgment in favor of the Town. That judgment was reversed in *Mayhew v. the Town of Sunnyvale* ("*Mayhew I*"), App. D. on remand, after a three week trial involving testimony from 35 witnesses and the admission of 133 exhibits into evidence, the trial court entered 145 findings of fact and 55 conclusions of law. Findings of Fact and Conclusions of Law, App. H. The trial court found, *inter alia*, that:

> 26. The Mayhew Ranch Planned Development was well-planned and satisfied all of the requirements contained in Article XV and the Zoning Ordinance of the Town of Sunnyvale.
>
> 28. The Mayhew Ranch Planned Development was designed and prepared in accordance with sound land planning principles.
>
> 37. The Mayhew Ranch Planned Development was and is consistent with and would not have an adverse impact upon the public health, safety, welfare and morals of the Town of Sunnyvale and its citizens.

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[1] The original petition was filed on March 6, 1987. A First Amended Original Petition was filed on October 25, 1991.

38. The Mayhew Ranch Planned Development was and is consistent with the use regulations of the Zoning Ordinance of the Town of Sunnyvale and the requirements of Article XV.

39. The Mayhew Ranch Planned Development was and is consistent with the Comprehensive Plan of the Town of Sunnyvale.

44. The fiscal impact of the Mayhew Ranch Planned Development on the Town of Sunnyvale and the school district would have been more beneficial than the fiscal impact of development of the Plaintiffs' property with one-acre lots.

65. Each and every required public facility or service was available, or could have been made available in a fiscally sound manner, to serve the Mayhew Ranch Planned Development.

74. The Town Council's decision to deny the application for planned development approval for the Mayhew Ranch Planned Development was not based on any of the criteria in Article XV or the Zoning Ordinance of the Town of Sunnyvale.

78. The Planning and Zoning Commissioner's recommendations to the Town Council of November 20, 1986 had no basis in fact and were not rational.

79. The Town Council's decision to deny the application of planned development approval for the Mayhew Ranch Planned Development had no basis in fact.

82. The Town of Sunnyvale's one-acre zoning does not bear any factual relationship to valid planning principles or objectives.

> 93. No rational person could conclude, and reasonable persons could not differ, that the one-acre zoning in the Town of Sunnyvale, as applied to Plaintiffs' property, bears any relationship to the public health, safety, welfare, and morals of the Town of Sunnyvale and its citizens.
>
> 104. As a result of the Town Council's denial of the application for planned development approval for the Mayhew Ranch Planned Development, all economically viable use of Plaintiffs' property was denied.
>
> 105. As a result of the continued application of the one-acre zoning on Plaintiffs' property, all economically viable use of Plaintiffs' property was denied.
>
> 117. Agriculture is not an economically viable use of Plaintiffs' property.
>
> 118. No knowledgeable investor would purchase Plaintiffs' property as it is currently zoned.

App. H. The trial court entered judgment in favor of the Petitioners on all constitutional counts and awarded declaratory relief, injunctive relief and damages against the Town in the amount of $5 million. Trial Court Judgment, Appendix G.

The Town appealed to the Fifth District Court of Appeals. On May 10, 1994, the court reversed and rendered judgment in favor of the Town holding that none of the Mayhews' claims were ripe for review. *Town of Sunnyvale v. Mayhew*, App. E. On February 16, 1995, on a Petition for Rehearing, the court entered a supplemental opinion. *Town of Sunnyvale v. Mayhew*, App. F. ("*Mayhew II*"). The *Mayhew II* court upheld its ripeness decision, but nonetheless proceeded to issue an opinion that

was, in light of the court's lack of subject matter jurisdiction due to its ripeness ruling, mere *obiter dictum*.

The Supreme Court of Texas granted Petitioners' writs of error and reversed the Court of Appeals decisions, holding that Petitioners' claims were ripe and then entered judgment in favor of the Town. Petitioners filed a petition for reconsideration in regard to two issues: 1) the Supreme Court of Texas' determination that a taking claim is a question of law; and 2) the Supreme Court of Texas' determination that procedural due process in the zoning context requires nothing more than notice and a hearing. The Supreme Court of Texas denied the petition for reconsideration and Petitioners now present these two vital federal constitutional issues to this honorable Court.

REASONS FOR GRANTING THE WRIT

The federal question presented is not a matter of idle curiosity. For more than two decades, this Court has labored to establish a balance between the competing public and private interests in the private use of private property. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987); *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The decision of the Supreme Court of Texas, while paying lip service to this Court's holdings, substantively eviscerates federal takings law in Texas. This clearly

undermines decades of rulings from this Court and renders property rights in Texas a virtual nullity.

Furthermore, this Court has held that "[d]ue process of law, within the meaning of the Constitution, is secured when the laws operate on all alike, and no one is subjected to partial or arbitrary exercise of the powers of the government." *Maxwell v. Dow*, 176 U.S. 581, 603 (1900). The Honorable Justice Marshall recognized that "'[t]he public has the right to expect its officers . . . to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse.'" *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 590 (1972) (Marshall, J., dissenting) (quoting *Hornsby v. Allen*, 326 F.2d 605, 610 (5th Cir. 1964). The Due Process Clause, *at a bare minimum*, requires that the affected persons receive "notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The Supreme Court of Texas' off hand "evaluation" and dismissal of the Mayhew's procedural due process claim nullifies any notion of meaningful procedural due process. The Town's denial of the Mayhew's Application, which satisfied every criteria of Article XV, implicates more than a wooden notice and opportunity to be heard requirement. By simply stating that zoning is a legislative act, the Supreme Court of Texas has shunned its responsibility to uphold the laws of the Constitution of the United States and denied the Petitioners a *meaningful* opportunity to participate.

ARGUMENT

I.

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE TAKINGS JURISPRUDENCE REQUIRES A MORE EXACTING FACTUAL INQUIRY THAN PROVIDED BY THE TEXAS COURTS

Under *Nollan*, the factual inquiry implicated by a takings claim is a more searching inquiry than the traditional, deferential inquiry applied in a substantive due process claim:

> Contrary to Justice BRENNAN's claim, *post*, at 3150, our opinions do not establish that these standards are the same as applied to due process or equal protection claims. To the contrary, our formations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980), not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective."

483 U.S. at 834 n.3.

In *Dolan*, this Court reiterated that the nexus required in takings jurisprudence is more exacting than the rational basis standard applicable to substantive due process and equal protection challenges. 512 U.S. at 391. Additionally, *Dolan* implied that the government has the burden of proof of demonstrating the required nexus between the governmental action and public interest sought to be served:

> [O]n the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development *reasonably relate* to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "*could* offset some of the traffic demand ... and lessen the increase in traffic congestion."

Id. at 395 (emphasis added).

Petitioners respectfully submit that the decision of the Supreme Court of Texas, while paying lip service to this Court's precedents, flies directly in the face of the more-searching inquiry established by this Court for takings claims. If a state court can evade this Court's rulings by the simple artifice of characterizing a takings claim as a question of law, without regard to the facts, then the Just Compensation Clause of the Constitution of the United States is nothing but an empty shirt. The extension of an "anything goes" standard to the factual bases for police power enactments into the *takings* calculus subordinates private property rights to the whims of any local government willing to mouth words of legitimate interest, whether those words are true or not.

A. The United States Supreme Court's View of What is Required to Satisfy The "Substantially Advances" Requirement is Abundantly Clear

Petitioners submit that this Court's view as to the nexus required to satisfy the "substantially advances" standard is abundantly clear: a regulatory action applied to a particular parcel of land must substantially (to a substantial or great degree) advance (actually serve) the public interest implicated by the governmental action. Each word -- *substantially* and

advances -- has ordinary meaning and clearly prescribes a factual situation where a challenged action must actually and, to some significant degree, advance a legitimate public interest. Any doubt as to this Court's intention are dispelled by the Court's unwavering recitation of this principle over a 17 year period:

> As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992) (citing *Agins,* 447 U.S. at 260) (emphasis added)). See also *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) ("A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests ...'"). Lower courts have adhered to this principle. See, e.g., *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 850 F. 2d 1483, 1486 (11th Cir. 1988) ("government regulation must 'substantially advance' a 'legitimate state interest'") and *Lee County v. Sunbelt Equities II Limited Partnership*, 619 So. 2d 996, 1006 (Fla. 2d DCA 1993) ("land use restrictions must substantially advance some legitimate state interest, or they are invalid.")

Thus, the required relationship between a challenged governmental action and the legitimate public interest to which the action was directed is that the factual evidence must show that the action: 1) actually advances the legitimate public interest, and 2) does so to a substantial degree. The answer to these two questions can only be determined by adjudicated facts. The adjudicated facts in this case make it clear that, although the Town's growth management objectives were indeed a legitimate public interest, the actions of the Town did not actually advance, substantially or otherwise, the Town's growth management agenda.

As this Court noted in another context, a regulation affects a taking if it "utterly fails to further the end advanced as the justification for the prohibition." *Nollan*, 483 U.S. at 837. The question of whether a taking has occurred may ultimately be a question of law, but the "utterly fails" part of this Court's formulation is a question of fact. In this case the trial court heard the evidence and adjudicated certain facts. The Supreme Court of Texas, however, avoided those essential factual determinations, not because they were erroneous, but through the artifice of characterizing the issue as one of law, eviscerating this Court's clear holding and transmuting the substantially advances standard into another version of "anything goes."

B. The Essentially Factual Inquiry Required By The Supreme Court's Precedents Is Meaningless if Trial Court Factual Adjudications Can Be Ignored By a State Appellate By Treating a Takings Claim As a Question of Law

Under this Court's decisions, a determination of when "justice and fairness" requires that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons turns on what are "essentially ad hoc, factual inquiries." *Penn Central*, 483 U.S. at 124. In order to prevail in a takings claim, a property owner must demonstrate, as a matter of fact, that the owner has been deprived of all economically beneficial use of his or her property or that the government's zoning actions do not substantially advance a legitimate public interest. And, this Court has made it clear that a local government may not avoid a taking claim by simply reciting the appropriate justifications in support of their actions:

> In Justice BLACKMUN's view, even with respect to regulations that deprive an owner of all

> developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. See post, at 2906, 2910-2912. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

Lucas, 505 U.S. at 1026 n.14. In this case, the Texas Supreme Court has resurrected "artful characterizations" by treating a takings claim as a question of law subject to an appellate court's de novo jurisdiction unfettered by trial court adjudications of fact and, in so doing, has eviscerated federal constitutional property rights in the State of Texas.

In the land use context, the factual inquiry into whether a governmental action deprives a property owner of all economically beneficial use or substantially advances a legitimate public interest inevitably turns on competing expert witness testimony -- appraisers, land economists, planners and engineers – in regard to the intangibles of public and private values, including the "blessings of quiet seclusion." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). As a result, the experience, expertise and credibility of the witnesses and their opinion testimony becomes the fulcrum of the constitutional test this Court has established because this Court requires something more than "artful characterizations" and the "mere mouthing" of appropriate justifications in order to avoid a takings claim. *See Lucas*, 505 U.S. at 1026 n. 14.

In this case, the trial court heard 33 witnesses, most of them professional experts. The trial court heard and judged the witnesses for and against the Town, and the trial court found

that none of the Town's justifications were supported by credible evidence. **In other words, the trial court found that while the Town recited the appropriate justifications in support of their actions, the justifications were not supported by credible factual evidence.**

On appeal, the Texas Supreme Court determined that a takings claim is a question of law. Having done so, the court then held that it was not bound by the trial court's factual adjudications relative to the ultimate legal issues. Freed from the trial court's factual adjudications, the Court conducted a de novo search of the trial record and held that no taking had occurred because the record contained the requisite words of rationality – artful characterizations of appropriate justifications in support of the Town's actions, without any regard whatsoever for the experience, expertise and credibility of the witnesses and their opinion testimony. The Texas Supreme Court did so, even though the trial court, based on its observation of the experience, expertise, demeanor and credibility of the Town's witnesses found that the Town's words of rationality – artful characterizations of appropriate justifications – in support of the Town's actions were not supported by fact.

In so doing, the court transformed the more searching factual inquiry established in this Court's precedents into a single question of whether the local governments's staff were smart enough to proffer the appropriate words of rationality.

The constitutional result of the decision of the Supreme Court of Texas is that a property owner can not prevail in a takings claim, so long as the local government in question is smart enough to place words of rationality – artful characterizations of appropriate justifications in support of the Town's actions in the record on appeal – whether those justifications are true or not. Petitioners respectfully submit that

the decision of the Supreme Court of Texas conflicts with the holdings of this Court and eviscerates the federal constitutional rights of Texas property owners. That is, in Texas, all a local government need do to avoid a takings claim is proffer words of rationality – artful characterizations of appropriate justifications – in support of the Town's actions. Petitioners submits that the takings clause *requires more*. As this Court has stated:

> Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

Lucas, 505 U.S. at 1026 n.12.

II.

THE SUPREME COURT OF TEXAS' HOLDING IN REGARD TO PETITIONERS' PROCEDURAL DUE PROCESS CLAIM TRANSFORMS THE CONCEPT OF FUNDAMENTAL FAIRNESS INTO "YOU TAKE YOUR CHANCES"

The Supreme Court of Texas' shallow consideration of Petitioners' procedural due process claim reflects another astonishing "reversal of fortunes." The Texas court introduces the subject of procedural due process with a paean to a "meaningful opportunity to be heard" and then discards "meaningfulness" altogether in favor of any old notice and hearing, whether meaningful or not, because the Texas court concludes that "zoning is a legislative act." While some zoning actions are indeed legislative in character, others are not. A determination as to whether to grant a special use permit or a

variance are classic examples of zoning actions which are not legislative acts.

> ... it makes no sense where the legislature is dispensing or refusing to dispense special grants. When the local legislature acts to pass general laws applicable generally it is performing its traditional role and is entitled to be free of those strictures we place upon an agency that is charged with granting or denying special privileges to particular persons. When the municipal legislature crosses over into the role of hearing and passing on individual petitions in adversary proceedings it should be required to meet the same procedural standards we expect form a traditional administrative agency.

Babcock, R.F., THE ZONING GAME (U. Wisc. Press 1966).

In this case, the Mayhews did not seek a zoning change that is a legislative act under Texas law.[2] Rather, the Mayhews sought approval of a planned development permissible under the zoning district applied to the Mayhews' property. The application satisfied every criteria in Article XV, thereby removing any notion of "legislative discretion." As such, the Mayhews' application implicated more than the mere notice and hearing required for a rezoning. It is well-settled that development review decisions that are not legislative in character must be fettered by discrete standards. Otherwise, the opportunity exists for ad hoc, sloppy, and self serving zoning decisions that have well-defined adverse consequences without

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[2] It should be observed that most leading states have long since abandoned the fiction that a rezoning which affects an individual parcel of land is a "legislative act." *See e.g.* , *Board of County Commissioners of Brevard County v. Snyder,* 627 So. 2d 469, 474 (Fla. 1993).

off setting benefits.[3] In *Fasano v. Board of County Commissioners*, 507 P.2d 23 (Or. 1973), the Oregon Supreme Court, citing the dangers of the "almost irresistible pressures that can be asserted by private interests on local government," concluded that zoning must be consistent with the goals and policies of a comprehensive plan and that strict scrutiny would apply to such quasi-judicial decisions.

Specifically, the application of established standards to a land use application is not a legislative discussion and should receive an action and heightened standard of judicial review. While there are no Texas cases which have confronted this particular issue, the decisions of other state courts have been clear for many years.

> [A] zoning ordinance must prescribe definite standards for the guidance and control of the building inspector, building officials and indeed municipal council, when by ordinance it reserves to itself various administrative zoning powers. An ordinance whereby the city council delegates to itself the arbitrary and unfettered authority to decide where and how a particular structure shall be built or where located without at the same time setting up reasonable standards which would be applicable alike to all property owners similarly conditioned, cannot be permitted to stand as a valid municipal enactment.

North Bay Village v. Blackwell, 88 So. 2d 524,526 (Fla. 1956).

In this case, the Texas courts had already held that the Town's rejection of the Mayhew Ranch Planned Development was not arbitrary and capricious even though the application

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[3] *Snyder* at 473.

demonstrated that the proposed development met each and every one of the Town's standards for planned development approval. Assuming that holding to be the law of the case, then Petitioners submit that the Town can not have it both ways.

"The basic ideal of fairness is incorporated into the United States Constitution through the requirement that government provide each citizen with 'due process of law.' Due process requires a system in which decisions are rationally made, in a process open to the public, on the basis of facts and within a reasonable period of time." Fred Bosselman, et al., THE PERMIT EXPLOSION: COORDINATION OF THE PROLIFERATION 75 (1976). Furthermore, this Court's precedent has been held to prevent local land use decisions to be based upon the whim of local officials or the local citizens:

> As a general matter, therefore, the public's "negative attitudes, or fear, unsubstantiated by factors properly cognizable in a zoning proceeding, are not permissible bases" for local officials' land use decisions.

Marks v. City of Chesapeake, 883 F.2d 308, 311 (4th Cir. 1989) (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985).

The Town denied procedural due process to the Petitioners because the Town's standards-less decision denied the Petitioners a merit-based decision and a meaningful opportunity to participate. Notice and hearing are meaningless

concepts when individual interests are decided without regard to the standards or the merits in a room filled with "NIMBYs."[4] The essence of the due process clause is a meaningful opportunity to participate. Merit based decisions on the basis of established standards is essential to avoid the passions of "neighborhoodism."

CONCLUSION

The Decision of the Supreme Court of Texas, while paying lip service to this Court's holdings, substantively eviscerates federal takings law in Texas. Under *Nollan*, the factual inquiry implicated by a takings claim is a more searching inquiry than the traditional, deferential inquiry applied in a substantive due process claim. 483 U.S. at 834 n.3. Yet, the Supreme Court of Texas, by simply characterizing a takings claim as a question of law, disregarded the factual findings of the trial court and held that the mere mouthings of words of rationality are sufficient to defeat a "fails to substantially advance" takings claim. This clearly undermines decades of rulings from this Court and renders property rights in Texas a virtual nullity.

Additionally, by casting the Town's denial of the application as a legislative action and holding that notice and an opportunity to be heard were sufficient to satisfy the requirements of procedural due process, the Supreme Court of Texas has added insult to injury. Petitioners respectfully urge

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[4] The "Nimby" (Not in My Backyard) phenomenon has been described as a situation "whereby affluent suburbanites glommed on to ostensibly benign environmental regulations as an effective technique for making their established suburbs more exclusive and more expensive." Gideon Kanner, *Hunting the Snark Not the Quark: Has the U.S. Supreme Court been Competent in its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URBAN LAWYER 307, 318 (1998).

this Court to grant this petition for writ of certiorari to decide these important issues and to correct the substantial injustice inflicted by the Supreme Court of Texas' misapplication of this Court's rulings.

Respectfully Submitted,

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APPENDIX

Appendix A

IN THE SUPREME COURT OF TEXAS

No. 95-0771

CHARLES MAYHEW, SR., CHARLES MAYHEW, JR., THE ESTATE OF AUDREY MAYHEW, AND SUNNYVALE PROPERTIES, LTD.,

PETITIONERS

v.

THE TOWN OF SUNNYVALE, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued on October 24,1996

JUSTICE ABBOTT delivered the opinion for a unanimous Court.

We are confronted with two primary questions in this regulatory takings case. First we must determine the extent to which the Mayhews' claims are ripe for our consideration. Second, we must decide whether the denial of the Mayhews'

planned development proposal violated their constitutional rights. While we conclude that the Mayhews' claims are ripe, we hold that the Town did not violate their constitutional rights. We reverse the court of appeals' judgment dismissing the Mayhews' claims, and we render judgment that the Mayhews take nothing.

I

The Town of Sunnyvale, a Texas general law municipal corporation with a population of approximately 2,000 people, is located approximately twelve miles east of the central business district of Dallas. The Town contains approximately 10,941 acres of land, but approximately 8,190 acres are currently vacant The Town's first zoning ordinance, adopted in 1965, allowed residential development at a density of 3.6 units per acre. In 1973, in response to septic tank failures, the Town modified its zoning ordinance and enacted a one-acre minimum lot size requirement However, when sanitary sewer facilities were later made available to the Town, the Town did not repeal its one-acre minimum lot requirement.

The Mayhew family owns approximately 1196 acres of land in Sunnyvale. From 1941 to 1965, the Mayhews acquired 850 acres of their property at a cost of $372,000.00. The Mayhews used this property for ranching for a number of years. In 1985 and 1986, the Mayhews purchased an additional 346 acres in the Town for development purposes. The Mayhews' property comprises 26% of the land available for residential development in the Town.

In 1985, the Mayhews began meeting with various Town officials seeking permission to proceed with a planned development with a density in excess of the then allowable

one-dwelling unit-per-acre residential zoning. The Mayhews told the Town a planned development would not be feasible under one-unit-per-acre zoning. In 1986, after meeting with the Mayhews, the Town adopted a comprehensive plan providing for a projected population of 25,000 by the year 2006, and 30,000 to 35,000 persons by the year 2016. The Town also amended article XV of its zoning ordinances to allow, upon council approval, planned developments with densities in excess of one dwelling-unit per acre.

In July 1986, after spending over $500,000 conducting studies and preparing evaluative reports, the Mayhews submitted their planned development proposal to the Town. If the proposal was approved, the Mayhews planned to sell their property to the Trammel Crow Company for development Because Trammel Crow would only develop the property if it could build a minimum of 3,600 units, the Mayhews requested approval to build between 3,650 and 5,025 units on their land, a density of over three units per acre.

The Town employed a professional planning and engineering firm to initially review the proposal. This firm, after finding that the proposal satisfied each of the requirements of the Town's zoning ordinance, recommended approval of the proposal. The proposal was then forwarded to the Town's planning and zoning commission.

While the commission was reviewing the Mayhews' application, the Town council passed a moratorium on planned developments, which was in effect until the Spring of 1987. Despite the moratorium, the commission continued to consider the Mayhews' application. After four months of consideration, the commission recommended denial of the Mayhews' application on November 20, 1986. In support of its recommendation, the commission noted that the

development would severely impact the ability of the Town to provide adequate municipal services. The commission also reasoned that the Town had a very unique character and lifestyle that differed from the proliferation of multi-family and single-family homes on small lots in adjoining municipalities. According to the commission, a less dense use of the property was preferable.

The Town council appointed a negotiating committee of two Town councilmen, the Town mayor, and the Town attorney. The Mayhews met with the committee and both sides tentatively agreed to a compromise development of 3,600 units. Subsequently, on January 13, 1987, the Town council met to vote on the proposal. During the council meeting, Charles Mayhew, Jr. told the council that anything less than approval for 3,600 units would be considered an outright denial. Despite the prior compromise, the Town council voted to deny the Mayhews' development proposal by a four-to-one vote. A subsequent meeting to reconsider the planned development request was canceled by the Town.

In March 1987, the Mayhews sued the Town and the four individual council members who voted against their proposal, alleging that the refusal to approve the planned development violated their state and federal constitutional rights to procedural due process, substantive due process, and equal protection. The Mayhews further alleged that the Town's decision was a taking of their property without payment of just or adequate compensation. The Mayhews also brought various statutory claims.

The Town and the individual council members moved for summary judgment which the district court granted. On appeal, the court of appeals affirmed the summary judgment in favor of the individual council members, and also affirmed the

summary judgment in favor of the Town on the Mayhews' statutory claims. However, the appellate court reversed the summary judgment on the Mayhews' constitutional claims against the Town, concluding that material fact questions existed regarding whether the Town violated the Mayhews' state and federal constitutional rights. *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284,286 (Tex. App.—Dallas 1989, writ denied), *cert. denied*, 498 U.S. 1087 (1991).

Upon remand, the district court held a bench trial. The court heard testimony from thirty-five witnesses, most of whom were experts. At the conclusion of the trial, the district court made numerous findings of fact and conclusions of law, including findings that:

> 26. The Mayhew Ranch Planned Development was well-planned and satisfied all of the requirements contained in Article XV and the Zoning Ordinance of the Town of Sunnyvale.
>
> 36. Adequate steps were taken in the design of the Mayhew Ranch Planned Development to protect the public health, safety, welfare, and morals of the Town of Sunnyvale and its citizens.
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> 40. Growth and development in the Town of Sunnyvale cannot possibly reach the population projection in the Comprehensive Plan of the Town of Sunnyvale under the Town's one-acre zoning.
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> 78. The Planning and Zoning Commission's recommendations to the Town Council of

November 20, 1986 had no basis in fact and were not rational.

82. The Town of Sunnyvale's one-acre zoning does not bear any factual relationship to valid planning principles or objectives.

87. The existing development in the Town of Sunnyvale is suburban and urban and any "rural" atmosphere that exists is the result of the existence of undeveloped private property.

99. In denying the application for planned development approval for the Mayhew Ranch Planned Development, the Town of Sunnyvale has refused to allow economically viable development on [the Mayhews'] property with the intention to prevent all development.., and thereby impose a servitude for the benefit of the public.

101. In denying the application for planned development approval. . . , and in enacting numerous moratoria on applications for consideration of planned development approval, the Town of Sunnyvale has acted pursuant to an official policy not to allow development with a density of greater than one dwelling unit per acre.

106. Prior to the Town Council's action to deny the application for (the] planned development... , the [Mayhews'] property had a fair market value of at least $9,700,000.00.

107. The value of the (Mayhews'] property on January 13, 1987, with development ap~val... and without the application of the one-acre zoning requirement, would have been greater than $15,000,000.00.

108. As a result of the Town Council's denial of the application for [the] planned development..., and the continued application of the one-acre zoning, the fair market value of the [Mayhews'] property was reduced to $2,400,000.00.

115. The minimum residential density necessary for economic viability on [the Mayhews'] property is approximately 3,600 dwelling units or three dwelling units per acre.

117. Agriculture is not an economically viable use of [the Mayhews'] property.

118. No knowledgeable investor would purchase [the Mayhews'] property as it is currently zoned.

120. The Town Council's decision to deny the application for [the] planned development... has the practical effect of depriving [the Mayhews] of the only economically viable use of their property.

121. The result of the Town Council's decision to deny the application for [the] planned development.., is to destroy the value of [the Mayhews'] property.

> 131. The actions of the Town of Sunnyvale reveal a pattern and practice which demonstrates the intent of the Town of Sunnyvale to deny any application for developmental approval with a density greater than one dwelling unit per acre.
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> 133. The Town of Sunnyvale has closed the door on future reapplication by [the Mayhews] at a realistic or economically viable density.

Based on its findings, the district court concluded that the case was ripe for adjudication and that the Mayhews should prevail on their procedural due process, substantive due process, and equal protection claims under the federal and state constitutions. The district court further concluded that the Town's decision to deny the application for the planned development was an unconstitutional taking under both the federal and state constitutions. The court rendered judgment in favor of the Mayhews, awarding $5 million in damages, $2.3 million in prejudgment interest, approximately $1.2 million in attorney's fees, and costs.

The court of appeals reversed the district court's judgment and dismissed the Mayhews' claims against the Town, holding that none of the claims was ripe for review. 905 S.W.2d 234. In a supplemental opinion, the court of appeals addressed the merits of the Mayhews' claims in light of this Court's opinion in *Taub v. City of Deer Park*, 882 S.W.2d 824 (Tex. 1994), *cert. denied*, 513 U.S. 1112 *(1995)*. The court concluded that, even if the Mayhews' claims were ripe, the evidence was factually insufficient to support the trial court's findings. 905 S.W.2d at *259-68*.

We granted the Mayhews' application for writ of error to consider whether their claims were ripe for review and whether judgment should be rendered on the Mayhews' state and federal constitutional claims.

II

Our initial inquiry is whether the Mayhews' claims are ripe for this Court's review. Ripeness is an element of subject matter jurisdiction. *State Bar of Texas v. Gomez,* 891 S.W.2d 243,245 (Tex. 1994); *City of Garland v. Louton,* 691 S.W.2d 603, 605 (Tex. 1985). As such, ripeness is a legal question subject to de novo review that a court can raise sua sponte. *Texas Ass'n of Business v. Texas Air Control Bd,* 852 S.W.2d 440, 444-45 (Tex. 1993)(subject matter jurisdiction cannot be waived and may be raised for the first time on appeal by the parties or by the court); *North Alamo Water Supply Corp. v. Texas Dep't of Health,* 839 S.W.2d 455,457 (Tex. App.--Austin 1992, writ denied)(issue of court's jurisdiction presented a question of law). *See also Reahard v. Lee County,* 30 F.3d 1412, 1415 (11th Cir. 1994)(ripeness is a jurisdictional issue subject to a de novo review), *cert. denie4,* 514 U.S. 1064 (1995); *Christensen v. Yolo County & L of Supervisors,* 995 F.2d 161, 163-64 (9th Cir. 1993Xripeness is a question of law subject to de novo review); *Harrington v. County of Sonoma,* 857 F.2d 567, 568 (9th Cir. 1988Xsame), *cert. denied,* 489 U.S. 1090 (1989).

The ripeness requirement emanates, in part, from the separation of powers provision set out in article II, section 1 of the Texas Constitution. Under the separation of powers doctrine, courts are without jurisdiction to issue advisory opinions because such is the function of the executive department, not the judiciary. *Texas Ass'n of Business,* 852 S.W.2d at 444; *see also Public Util. Comm'n v. Houston*

Lighting & Power Co., 748 S.W.2d 439 (Tex. 1987XA court has no jurisdiction to render an advisory opinion on a controversy that is not yet ripe."); *City of Garland*, 691 S.W.2d at 605 (same); *Coalson v. City Council of Victoria*, 610 S.W.2d 744, 747 (Tex. 1980)(Texas Constitution precludes district courts from giving advisory opinions in prematurely filed actions).

The ripeness doctrine conserves judicial time and resources for real and current controversies, rather than abstract; hypothetical, or remote disputes. *See Browning-Ferns, Inc. v. Brazoria County*, 742 S.W.2d 43,49 (Tex. App.—Austin 1987, no writ). In this regard, the state ripeness doctrine is similar to the federal ripeness doctrine in that it has both constitutional and prudential dimensions.

This Court has never addressed the ripeness of constitutional challenges to land use regulation. We are aware of only one published Texas decision, *City of El Paso v. Madero Dev.*, 803 S.W.2d 396, 400 (Tex. App. -- El Paso 1991, writ denied), *cert. denied*, 502 U.S. 1073 (1992), in which the ripeness of regulatory takings and related constitutional claims was analyzed. In that case, the court of appeals relied heavily on federal law to hold that the landowner's claims were not ripe. We agree that we should look to the experience of the federal courts in determining the ripeness of constitutional challenges to land-use regulations.[5]

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[5] It is possible that we are compelled to reach this result, at least with respect to the Mayhews' federal claims. While state procedural law generally determines the manner in which a federal question is to be presented in state court, that is not the case if federal substantive law defines its own procedural matrix. See TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-24, at 166 (2d ed. 1988). Because the United States Supreme Court has stated that the "final decision" prudential ripeness requirement "follows from the principle that only a regulation that 'goes to far' results in a taking under the

Cf Texas Ass'n of Business, 852 S.W.2d at 444 ("Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.")

Fifth Amendment," *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1665 (1997)(citations omitted), a persuasive argument could be made that the "final decision" aspect of ripeness is not independent of federal substantive law. *See also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986)(final decision is an "essential prerequisite" of a regulatory takings claim). In any event, we need not determine whether we are compelled by federal supremacy to rely on federal law because, in determining the ripeness of the Mayhews' regulatory takings claims in this case, we apply federal jurisprudence.

A

The federal courts have recognized, as a prudential matter, an essential prerequisite to the ripeness of federal regulatory takings and related constitutional claims. *Suitun v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1664-65 & n.7 (1997). This essential prerequisite' requires "a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes. *MacDonald, Sommer & Fratu v. Yolo County*, 477 U.S. 340, 348 (1986)(citations omitted). In other words, the federal courts have reasoned that a court cannot determine whether a taking or other constitutional violation has occurred until the court can compare the uses prohibited by the regulation to any permissible uses that may be made of the affected property.

Accordingly, in order for a regulatory takings claim to be ripe, there must be a final decision regarding the application of the regulations to the property at issue.[6] Suitum, 117 S. Ct. At 1655; *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 186 (1985). A "final decision" usually requires both a rejected development plan and the denial of a variance from the controlling regulations. *Hamilton Bank*, 473 U.S. at 187-88; *see also MacDonald*, 477 U.S. at 351-52 & n.8 (case was not ripe when a single intense' subdivision proposal was rejected because a "meaningful application' had not been made);

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Moreover, before a regulatory takings claim can be maintained in federal court, a plaintiff must seek compensation through the procedures the state has provided for doing so. *Suitum*, 117 S. Ct. Ay 1655; *Hamilton Bank*, 473 U.S. at 194-95. This requirement does apply in this case.

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 293-97 (1981)(Court refused to consider takings claim based on general regulatory provision that had not been applied to specific properties and from which no administrative relief had been sought); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)("as-applied" constitutional challenge was not ripe because the property owners had not yet submitted a plan for the development of their property).

However, futile variance requests or re-applications are not required. *See Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1012 n.3 (1992); *MacDonald*, 477 U.S. at 352 n.8; *Kawooka v. City of Arroyo Grande*, 17 F.3d 1227, 1232 (9thCir.), *cert. denied*, 513 U.S. 870 (1994); *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991); *Greenbriar, Ltd v. City of Alabaster*, 881 F.2d 1570, 1575 (11th Cir. 1989); *Hoehne v. County of San Benito*, 870 F.2d *529*, 534-35 (9th Cir. 1989); *Herrington v. County of Sonoma*, 857 F.2d at 569-70; *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454-55 (9th Cir.), *modgied on other grounds*, 830 F.2d 968(9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).

Moreover, the term "variance" is "not definitive or talismanic;" it encompasses "other types of permits or actions (that] are available and could provide similar relief." *Southern Pacific*, 922 F.2d at 503; *see also Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir.)(aggrieved landowner must "have sought variances or pursued alternative, less ambitious development plans'), *cert. denied*, 502 U.S. 810 (1991); *Landmark Land Co of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 721 (10th Cir. 1988)(claim not ripe until initial permit application denied and some effort made to "compromise' with the city to allow some level of

development). The variance requirement is therefore applied flexibly in order to serve its purpose of giving the governmental unit an opportunity to "grant different forms of relief or make policy decisions which might abate the alleged taking." *Southern Pacific*, 922 F.2d at 503.

The same "final decision" requirement applies to determine the ripeness of as-applied due process and equal protection challenges to a land-use decision. *See, e.g., Hamilton Bank*, 473 U.S. at 199-200 (concluding that due process claim under Fourteenth Amendment was not ripe because the requisite variance had not been sought to establish a "final decision,' and utilizing the same rationale in analyzing the ripeness of the takings claim and the due process claim); *Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285,1292-95 (3d Cir. 1993Xflnal decision rule of *MacDonald* and *Hamilton Bank* applies to substantive due process, equal protection, and procedural due process claims), *cert. denied*, 510 U.S. 914(1993); *Bigelow* v. *Michigan Dep 't of Natural Resources*, 970 F.2d 154, 159-60 (6th Cir. 1992)(procedural due process claim, which was related to plaintiffs takings claim, subject to the finality rule); *Eide* v. *Sarasota County*, 908 F.2d 716,725 (11th Cir. 1990)(finality requirement applies to substantive due process claim), *cen. denied*, 498 U.S. 1120 (1991); *Herrington*, 857 F.2d at 569 (final decision requirement applies to substantive due process and equal protection claims); *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cu. 1986)(final decision requirement applies to procedural due process and equal protection claims).

However, a final decision on the application of the zoning ordinance to the plaintiff's property is not required if the plaintiff brings a facial challenge to the ordinance. *See Pennell v. City of San Jose, 485* U.S. 1, 9-14 (1988); *Village*

of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926); *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890,894-95(6th Cir. 1991); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 242-43 (1st Cir. 1990); *Beacon Hill Farm Assocs. II v. Loudoun County Bd of Supervisors*, 875 F.2d 1081, 1084-85 (4th Cir. 1989).

B

The Mayhews alleged (1) just compensation takings claims, (2) "fails to substantially advance' takings claims, (3) substantive due process and due course claims, (4) equal protection claims, and *(5)* procedural due process and due course claims under the United States Constitution and Texas Constitution regarding the Town's denial of their planned development application for 3,600 units. The Mayhews also argue in their application for writ of error that their constitutional claims challenge the Town's continued application and enforcement of a blanket one-acre zoning designation on their property. We conclude, however, that this challenge is not independent from their claims stemming from the Town's denial of their planned development proposal. The record in this case clearly indicates that the Mayhews were only interested in the Town approving their development request for 3,600 units. As Charles Mayhew, Jr. testified, anything less than 3,600 units, the Mayhews believed, was an outright denial of their application. The Mayhews' very theory at trial was that the only economically viable use of their property was to develop it in accordance with the development proposal that the Town rejected. While the Town's general one-acre zoning requirement almost certainly contributed to the Town's rejection of the Mayhews' application, the one-acre zoning requirement itself did not cause a discrete injury separate from the harm the Mayhews

suffered as a result of the denial of their planned development proposal because the Mayhews had no intention of pursuing a development with less than 3,600 units.

The Town maintains that the Mayhews' claims regarding the denial of their planned development application are not ripe because the Mayhews submitted only one planned development application and did not thereafter reapply for development or submit a 'variance.' The Mayhews counter that, under the circumstances of this case, their planned development application and amended request for 3,600 units were sufficient~, and that any further applications would have been futile. We agree with the Mayhews.

After the Town denied the Mayhews' planned development application for 3,600 units, the Mayhews did not thereafter request a variance. Moreover, the Mayhews did not file another planned development application. Instead, the Mayhews filed this suit. Normally, their failure to reapply or seek a variance would be fatal to the ripeness of their claims. *See MacDonald*, 477 U.S. at 351; *Hamilton Bank*, 473 U.S. at 188-91. However, under the unique circumstances of this case, we conclude that the Mayhews' constitutional challenges to the Town's denial of their planned development application for 3,600 units are ripe for this Court's review.

A planned development is not a typical request for a zoning change; the density, type, and location of particular uses in the development are left to the planning process and are determined through negotiations between the developer and the town. The evidence in this case establishes the extent to which the Mayhews worked with the Town in attempting to have their development approved. The Mayhews originally requested approval to build between 3,650 and 5,025 units on their land. They spent over a year in negotiations with the

Town, and expended over $500,000 preparing and developing the application. The Mayhews presented the project to the Town planning stag the Town planning and zoning committee, and the Town council. After receiving a negative response from the planning and zoning committee, the Mayhews met with Town council members, and, in an effort to compromise, agreed to alter their application. The Mayhews then submitted a modified application to the Town council, which the council rejected.

The modified application that the Mayhews presented to the Town council requested 3,600 units, a reduction from their original request for approval. Such a compromise proposal can sometimes be sufficient to satisfy the variance requirement *Executive 100, Inc.*, 922 F.2d at 1540 (aggrieved landowner must "have sought variances or pursued alternative, less ambitious development plans'); *Landmark Land Co.*, 874 F.2d at 721 (claim not ripe until initial permit application denied and some effort made to "compromise' with the city to allow some level of development).

Moreover, this modified application was not the most profitable use envisioned by the Mayhews, but rather the minimum number of units the Mayhews believed necessary to make an economically viable use of their land. In fact; the very theory espoused by the Mayhews at trial was that only improvements along the lines of their 3,600 unit proposed planned development would avert a regulatory taking. In other words, the Mayhews alleged that anything less than the Town allowing their planned development would deny the only economically viable use of their property.

The United States Supreme Court has indicated that such a claim may be ripe without the necessity of seeking a variance or filing a subsequent application. In *MacDonald,*

after the county rejected the applicant's single proposal to subdivide the property into *159* single-family and multifamily residential lots, the applicant immediately sued, alleging that the county had restricted the property to an open-space agricultural use, thereby appropriating the property. *MacDonald*, 477 U.S. at 342-44. Because the county's only action was its rejection of a single subdivision proposal, the Supreme Court held that the applicant's claim that the county had deprived it of all use of its property was not ripe. In such a situation, the Court reasoned that the applicant had not received the county's "'final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id* at 351 (quoting *Hamilton Bank*, 473 U.S. at 191). But the Court noted that the applicant did not "contend that *only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking." Id.* at 352 n.8 (emphasis added). The Supreme Court accordingly implied that the result may have been different if the applicant's complaint had been that the only way to avert a regulatory taking was for the county to approve the subdivision proposal.

Of course, that is exactly the Mayhews' complaint. The Mayhews allege that anything less than approval for 3,600 units on their property constitutes a regulatory taking. The ripeness doctrine does not require a property owner, such as the Mayhews, to seek permits for development that the property owner does not deem economically viable. *See Buere-Co. v. United States*, 16 Cl. Ct. 42, 51 n.11 (1988). We accordingly conclude that, under the circumstances of this case, the Mayhews were not required to submit additional alternative proposals, after a year of negotiations and $500,000 in expenditures, to ripen this complaint.

Any other holding would require the Mayhews to expend their own time and resources pursuing, and the Town's time and resources considering, a development proposal that the Mayhews would never actually develop. Requiring such a wasteful expenditure of resources would violate the Supreme Court's admonition that a property owner is "not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a final] determination." *MacDonald*, 477 U.S. at 352 n.7. The Town clearly was not going to approve the Mayhews' development proposal for 3,600 units, making a subsequent application or variance request for 3,600 units a futile act We therefore hold that the Mayhews' claims that the Town violated their constitutional rights by denying their planned development proposal for 3,600 units are ripe for this Court's review.

III

The Mayhews brought five separate claims against the Town under the federal and state constitutions, alleging "fails to substantially advance" takings claims, "just compensation" takings claims, substantive due process and due course claims, equal protection claims, and procedural due process and due course claims. The Mayhews urged in their application for writ of error that Texas takings jurisprudence follows the federal standards. Accordingly, for purposes of this case, we assume, without deciding, that the state and federal guarantees in respect to land-use constitutional claims are coextensive, and we will analyze the Mayhews' claims under the more familiar federal standards. *Cf. Tilton v. Marshall*, 925 S.W.2d 672,677 n.6 (Tex. 1996)(assuming without deciding that the state and federal free exercise guarantees were coextensive with respect to relator's claims because relator did not demonstrate that the provisions should be applied differently).

Before proceeding to analyze the Mayhews' five constitutional claims, we must consider the proper effect of the findings of fact made by the district court in this case. Although determining whether a property regulation is unconstitutional requires the consideration of a number of factual issues, the ultimate question of whether a zoning ordinance constitutes a compensable taking or violates due process or equal protection is a question of law, not a question of fact. *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802,804 (Tex. 1984); *see also Hunt v. City of San Antonio*, 462 S.W.2d 536. *539* (Tex. 1971); *DuPuy v. City of Waco*, 396 S.W.2d 103, 110 (Tex. 1965). In resolving this legal issue, we consider all of the surrounding circumstances. *City of College Station*, 680 S.W.2d at 804; *see also Hunt*, 462 S.W.2d at 539; *City of Bellaire v. Lamkin*, 317 S.W.2d 43, 45 (Tex. 1958); *City of Warcahachie v. Watkins*, 275 S.W.2d 477, 481 (Tex. 1955). While we depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property, *cf Republican Party of Texas v. Diez*, 940 S.W.2d 86, 91 (Tex. 1997), the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law.[7]

A. REGULATORY TAKING CLAIM

The Just Compensation Clause of the Fifth Amendment provides that "private property [shall noti be

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[7] The United States Supreme Court appartenly also views the ultimate determinations in takings case as a legal issue. *See United States v. Causby*, 328 U.S. 256, 259 (1946)(accepting Court of Claims' factual conclusion that the existence of government airplanes in the airspace immediately above the property destroyed its value while reserving for itself the legal conclusion of whether a compensable taking occurred under the Fifth Amendment).

taken for public use, without just compensation.' This prohibition has been incorporated through the Fourteenth Amendment to apply to the individual states. *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, *175* n.1 *(1985); Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 241 (1897). Similarly, article I, section 19 of the Texas Constitution provides, in pertinent part, that no "person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made ..."

Takings can be classified as either physical or regulatory takings. Physical takings occur when the government authorizes an unwarranted physical occupation of an individual's property. *See Yee v. City of Escondido*, 503 U.S. 519,522 (1992). The Mayhews do not claim that the Town has physically taken their property. Rather, the Mayhews allege that the denial of their planned development constitutes a regulatory taking.

Zoning decisions are vested in the discretion of municipal authorities; courts should not assume the role of a super zoning board. *Goss v. City of Little Rock*, 90 F.3d 306, 308 (8th Cir. 1996); *Burns* v. *City of Des Peres*, 534 F.2d 103, 108 (8th Cir.), *cert. denied*, 429 U.S. 861 (1976). However, despite the discretion afforded to municipal authorities, zoning decisions must comply with constitutional limitations. As a general rule, the application of a general zoning law to a particular property constitutes a regulatory taking if the ordinance "does not substantially advance legitimate state interests' or it denies an owner all 'economically viable use of his land.' *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). *See also Dolan v. City of Tigard*, 512 U.S. 374, *385* (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003. 1016 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825,834(1987);

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987).

The Mayhews allege and the district court found, that the denial of the Mayhews' planned development did not substantially advance legitimate state interests and amounted to a taking because all economically viable use of their property was denied. We first analyze whether the Town's actions substantially advance legitimate governmental interests before determining whether the Town's actions denied the Mayhews all economically viable use of their property.

1. *Substantially Advance Legitimate Interests*

A property regulation must 'substantially advance' a legitimate governmental interest to pass constitutional muster. *See, e.g., Dolan*, 512 U.S. at 385; *Nollan*, 483 U.S. at 834. *See also City of College Station*, 680 S.W.2d at 805 (property regulation must be "substantially related" to a legitimate goal); *Hunt*, 462 S.W.2d at 539 (same); *Watkins*, 275 S.W.2d at 481 (same); *Lomabardo*, 73 S.W.2d at 485 (same). While it is clear that a zoning ordinance that does not Substantially advance a legitimate state interest constitutes a taking the standards for determining what constitutes a legitimate state interest or what relation between a regulation and the state interest satisfies the "substantially advance" requirement in a regulatory takings case has not been clarified by the United States Supreme Court. *See, e.g., Nollan*, 483 U.S. at 834.

The Supreme Court has, however, indicated that "a broad range of governmental purposes and regulations' will satisfy these requirements. *Id* at 834-35. Specifically, the Supreme Court has noted that the following state interests are legitimate state interests: protecting residents from the "ill effects of urbanization'; *Agins*, 447 U.S. at 261; enhancing

the quality of life; *Penn Central Tramp. Co. v. New York City*, 438 U.S. 104, 129 (1978); and protecting a beach system for recreation, tourism, and public health; *Keystone*, 480 U.S. at 488; *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 169(4th Cir. 1991), *cert. denied*, 505 U.S. 1219(1992).

In *A gins*, the City of Tiburon adopted a zoning ordinance governing development of open space land that limited the plaintiffs to building between one and five single-family residences on the five acres of land which they had previously purchased for residential development. 447 U.S. at 257. The Court held that protecting the residents of Tiburon from the ill effects of urbanization by precluding the conversion of open-space land to urban uses was a legitimate government purpose. *Id.* at 261. *Cf Penn Central Tramp. Co.*, 438 U.S. at 129 (preservation of desirable aesthetic features); *Village of Belle Terre v. Boraas*, 416 U.S. 1,9(1974); *Berman v. Parker*, 348 U.S. 26,32-33 (1954); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95 (1926); *see also Christensen v. Yolo County Bd of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993)(preservation of agricultural uses of land a legitimate state interest); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 244-45 (1st Cir. 1990)(controlling both the rate and character of community growth a legitimate government purpose); *Pompa Construction Corp. v. City of Saratoga Springs*, 706 F.2d 418,422 (2d Cir. 1983)(discouraging conversion of open-space land to urban uses a legitimate state interest). Such zoning ordinances benefit "the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas." *A gins*, 457 U.S. at 262.

The "substantial advancement" requirement examines the nexus between the effect of the ordinance and the

legitimate state interest it is supposed to advance. *See Yee v. City of Escondido*, 503 U.S. 519, 530(1992); *see also generally Nollan*, 483 U.S. at 837; *Esposito*, 939 F.2d at 169. This requirement is not, however, equivalent to the rational basis' standard applied to due process and equal protection claims. *Nollan*, 483 U.S. at 834 n.3. The standard requires that the ordinance "substantially advance" the legitimate state interest sought to be achieved rather than merely analyzing whether the government could rationally have decided that the measure achieved a legitimate objective. *Id*

The Town's denial of the Mayhews' planned development application passes constitutional muster under this standard. In making this determination, we do not review the wisdom of the Town's decision. *See Smithfield Concerned Citizens*, 907 F.2d at 245. Rather, we are concerned only with whether the decision satisfies constitutional standards.

The Mayhews allege that the real reason behind the denial of their development application was to have their property serve as "borrowed' open space for the residents of the Town who primarily live on less than one-acre lots. In support of this contention, the Mayhews presented evidence negating some of the reasons given by the planning and zoning commission for the denial of their development application. For instance, the Mayhews presented evidence establishing, and the district court found, that sanitary sewer facilities would not be a problem for the Mayhews' planned development because the local sewage plant was operating in full compliance with EPA guidelines and had enough capacity to serve the additional residences contemplated in the Mayhews' planned development.

But the Town's planning and zoning commission came forth with a number of separate reasons for the denial of the Mayhews' application, several of which substantially advance legitimate state interests. The Town denied the development application in part because of the impact the development would have on the overall character of the community and the unique character and lifestyle of the Town which is different from that of adjoining municipalities where there is a proliferation of multi-family and single-family homes on small lots. Under the Supreme Court's decision in *Agins*, concern for such urbanization effects is clearly a legitimate state interest.

We also conclude that the denial of the Mayhews' development application substantially advances the Town's legitimate concern for protecting the community from the ill effects of urbanization. The Mayhews requested a planned development with 3,600 units in a Town with a population of only approximately 2,000 residents. Photographs in the record show that the Town is uniquely rural and suburban, with undivided two lane roads, clusters of trees, lakes and ponds, and houses on large lots. This community would change drastically if a large planned development with at least three residences per acre was built. The Mayhews' planned development would result in an estimated population increase of between 10,000 and 15,000 persons, more than quadrupling the population of the Town. Simply put, the Town has a substantial interest in preserving the rate and character of community growth, and its action in denying the Mayhews' planned development furthers those interests.

2. *Just Compensation Takings Claim*

Our conclusion that the Town's action substantially advances a legitimate state interest does not end the takings

inquiry, however. A compensable regulatory taking can also occur when governmental agencies impose restrictions that either (1) deny landowners of all economically viable use of their property, or (2) unreasonably interfere with landowners' rights to use and enjoy their property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 10 15-19 & n.8 (1992); *see also Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994), *cert. denied*, 513 U.S. 111.2 (1995); *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978).

A restriction denies the landowner all economically viable use of the property or totally destroys the value of the property if the restriction renders the property valueless. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Lucas*, 505 U.S. at 1015-16, 1020; *Taub*, 882 S.W.2d at 826; *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 806 (sex. 1984); *Teague*, 570 S.W.2d at 393. Determining whether all economically viable use of a property has been denied entails a relatively simple analysis of whether value remains in the property after the governmental action.

In contrast determining whether the government has unreasonably interfered with a landowner's right to use and enjoy property requires a consideration of two factors: the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations. *See Lucas, 505* U.S. at 1019 n.8; *Penn Central*, 438 U.S. at 124. The first factor, the economic impact of the regulation, merely compares the value that has been taken from the property with the value that remains in the property. *Keystone*, 480 U.S. at 497. The loss of anticipated gains or potential future profits is not usually considered in analyzing this factor. *Andrus v. Allard*, 444 U.S. 51,66(1979); *see also Moore v. City of Cosa Mesa*, 886 F.2d 260, 263(9th Cir. 1989) *cert. denied*, 496 U.S. 906 (1990). The second factor is

the investment-backed expectation of the landowner. The existing and permitted uses of the property constitute the "primary expectation" of the landowner that is affected by regulation. *Penn Central*, 438 U.S. at 136; *see also Lucas*, 505 U.S. at 1017 n.7 (owner's reasonable expectations shaped by uses permitted by state law); *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 170 (4th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992)(the courts have traditionally looked to the existing use of property as a basis for determining the extent of interference with the owner's 'primary expectation concerning the use of the parcel.")(quoting *Penn Central*, 438 U.S. at 136). Knowledge of existing zoning is to be considered in determining whether the regulation interferes with investment-backed expectations. *See Pompa Construction Corp. v. City of Saratoga Springs*, 706 F.2d 418, 424-25 (2d Cir. 1983).

The Town urges that its rejection of the Mayhews' application did not unconstitutionally deprive them of their property. The Town first contends that the district court found that the Mayhews' property retained a value of at least $2.4 million following the denial of the planned development application; thus, according to the Town, the property's value was not totally destroyed. The Town next urges that the denial of the development request did not unreasonably interfere with the Mayhews' property rights because the Mayhews had no right to have their property "up-zoned" for a greater density of development. In other words, the Town asserts that the Mayhews had no reasonable investment-backed expectation to lose. The Town also maintains that the Mayhews were not singled out unfairly through the denial of the planned development proposal. Instead, the Town claims that the zoning applied evenly to all property owners in the

Town and the Town denied applications other than just the Mayhews' proposal.[8]

The Mayhews counter, however, that this is not the typical denial of an up-zoning application. The Mayhews point out that the district court found that the only economically viable use of this property was to construct 3,600 residential units. The district court also found that agriculture was not an economically viable use of the property. Finally, the district court found that, with one-acre zoning, it would take a minimum of 150 years before the Mayhews could completely develop their property. Accordingly, the district court found that no reasonable investor would purchase the Mayhews' property.

We first must consider the effect of these fact-findings relied on by the Mayhews. As discussed previously, the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law, but we depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property. Under substantive law, a regulatory taking occurs when governmental regulations deprive the owner of all economically viable use of the property or totally destroy the property's value. *Dolan*, 512 U.S. at 385; *Lucas*, *505* U.S. at 1015-16; *Taub*, 882 S.W.2d at 826. Some courts have made an alternative

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[8] As Justice Scalia has observed, "Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate [the Takings Clause] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation would be) the source of the social problem, it cannot be said that he has been singled out unfairly." *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988)(Scalia, J., dissenting).

pronouncement that a taking occurs when the government does not allow any use of the property that is sufficiently desirable to permit the property owner to sell the property. *See, e.g., Del Monte Dunes at Monterey Ltd. v. City of Monterey, 95* F.3d 1422, 1433(9th Cir. 1996), *petition for cert. file4,* 66 U.S.L.W. *3509* (U.S. Jan. 26, 1998)(No. 97-1235); *Park Ave. Tower Assoc. v. City of New York,* 746 F.2d 135, 139 (2d Cir.1984), *cert. denied,* 470 U.S. 1087 (1985). The district court's findings that there was no economically viable use of the property and that no reasonable investor would purchase the property purport to decide the ultimate legal issue of whether a taking has occurred. This, however, involves a question of law, and we therefore owe no deference to the trial court's "findings' in this regard. We will instead focus on the district court's underlying factual determinations regarding the extent of the governmental intrusion and the diminution in the property's value in determining whether the Town has taken the Mayhews' property without just compensation.

The relevant factual findings demonstrate that the Town has not totally destroyed all value of the property by denying the Mayhews' planned development proposal. In *Lucas,* the Supreme Court clarified that a taking occurs "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle." *Lucas, 505* U.S. at 1019 (emphasis in original). Because the trial court found that Lucas's property was rendered completely and wholly valueless by the regulations at issue, the Supreme Court concluded that a taking had occurred. *Id* at 1019-20. In contrast, the district court in this case determined that even after the denial of the Mayhews' planned development proposal, the property retained a value of $2.4

million. In such a situation, the governmental regulation has not entirely destroyed the property's value.

Even if the governmental regulation has not entirely destroyed the property's value, a taking can occur if the regulation has a severe enough economic impact and the regulation interferes with distinct investment-backed expectations. *See Lucas, 505* U.S. at 1019 n.8 (takings are to be measured by the "economic impact of the regulation on the claimant ... the extent to which the regulation has interfered with distinct investment-backed expectations"); *Penn Central,* 438 U.S. at 124 (same); *see also Taub,* 882 S.W.2d at 826 (sufficiently severe economic impact can constitute a taking). The reasonable investment-backed expectation of the claimant is critical to this analysis because it distinguishes this concept from those situations in which the landowner's property has been totally destroyed. Because we conclude that the Mayhews had no reasonable investment-backed expectation to build 3,600 units on their property, we hold that the Town has not unreasonably interfered with their right to use and enjoy their property by denying their planned development proposal.

When the Mayhews first began purchasing their property, the Town did not have a zoning ordinance in place. It is undisputed that the Mayhews originally purchased their property for ranching, not for development. They then used their property for ranching for nearly four decades. Historical uses of the property are critically important when determining the reasonable investment-backed expectation of the landowner. *See Esposito,* 939 F.2d at 170 ("the courts have traditionally looked to the existing use of property as a basis for determining the extent of interference with the owner's 'primary expectation concerning the use of the parcel")(quoting *Penn Central,* 438 U.S. at 136). After four

decades of ranching their property in a Town with a population of no more than 2,000 people, the Mayhews did not have a reasonable investment-backed expectation that they could pursue an intensive development of 3,600 units that would more than quadruple the. Town's population.

The Mayhews' subsequent purchases of property in 1985 and 1986 were for purposes of development. However, at this time, the Town's zoning ordinances had restricted development to one unit per acre for the preceding twelve years. The existing zoning of the property at the time it was acquired is to be considered in determining whether the regulation interferes with investment-backed expectations. *See Pompa Construction Corp.*, 706 F.2d at 424-25. We do not believe that
the Mayhews had a reasonable investment-backed expectation to build 3,600 units on their 1,200 acres when the Town's zoning ordinances had for twelve years limited development to one unit per acre.

Accordingly, we render judgment against the Mayhews on their regulatory takings claims. The Town's denial of the planned development substantially advanced legitimate state interests and did not totally destroy the value of the Mayhews' property or unreasonably interfere with their rights to use and enjoy their property.

B. SUBSTANTIVE DUE PROCESS

A court should not set aside a zoning determination for a substantive due process violation unless the action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Nectow v. City of Cambridge*,

277 U.S. 183, 187-88 (1928); *see also Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365,395(1926); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 243-44(1st Cir. 1990); *Greenbrier, Ltd v. City of Alabaster*, 881 F.2d 1570, 1577(11th Cir. 1989).

A generally applicable zoning ordinance will survive a substantive due process challenge if it is designed to accomplish an objective within the government's police power and if a rational relationship exists between the ordinance and its purpose. *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 174(5th Cir. 1996); *Christensen v. Yolo County Ed of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993); *Southern Pac. Tramp. Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991); *Smithfield Concerned Citizens*, 907 F.2d at 243-44; *Stansberry v. Holmes*, 613 F.2d 1285, 1289 *(5th* Cir.), *cert. denied*, 449 U.S. 886 (1980). This deferential inquiry does not focus on the ultimate effectiveness of the ordinance, but on whether the enacting body could have rationally believed at the time of enactment that the ordinance would promote its objective. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955). If it is at least fairly debatable that the decision was rationally related to legitimate government interests, the decision must be upheld. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464(1981); *FM Properties*, 93 F.3d at 175. The ordinance will violate substantive due process only if it is *clearly* arbitrary and unreasonable. *See Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 170 (4thCir. 1991), *cert. denied* 505 U.S. 1219 (1992).

In *Greenbriar*, 881 F.2d at 1577-80, the Eleventh Circuit was faced with a substantive due process challenge

similar to the challenge made by the Mayhews in this case. The fact finder determined in that case, based on conflicting evidence on whether the proposal was in the best interest of the community, that the city council had acted arbitrarily and capriciously in refusing to rezone the subject property based on "political pressure" from constituents. The Eleventh Circuit held, however, that this evidence was not sufficient to establish that the city acted irrationally or arbitrarily in rejecting the application. *Id* at 1580; *see also Sylvia Dev. Corp.* v. *Calvert County,* 48 F.3d 810, 827-29(4th Cir. 199SXa landowner who speculatively purchases property based on the possibility of an up zoning does not demonstrate a substantive due process violation when the county refuses to grant up zoning).

We likewise conclude that the Town did not act irrationally or arbitrarily in denying the Mayhews' planned development application.. The Town's concerns regarding the urbanization effects of the development are legitimate governmental interests, and the denial of the development application is clearly rationally related to those interests.

C. EQUAL PROTECTION

An as-applied equal protection claim requires that the government treat the claimant different from other similarly-situated landowners without any reasonable basis. *Executive 100, Inc. v. Martin County,* 922 F.2d 1536,1541 *(11th Cir.),cert denied,* 502 U.S. 810 (1991). The ordinance generally must only be rationally related to a legitimate state interest to survive an equal protection challenge, unless the ordinance discriminates against a suspect class. *Christensen* v. *Yolo County Ed of Supervisors,* 995 F.2d 161, 165 (9th Cir. 1993); *Southern Pac. Transp. Co. v. City of Los Angeles,* 922 F.2d 498, 507 (9th Cir. 1990), *cert. denied,* 502 U.S. 943

(1991). Economic regulations, including zoning decisions, have traditionally been afforded only rational relation scrutiny under the equal protection clause. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432. 440 (1985); *Clajon Production Corp.* v. *Petera,* 70 F.3d *1566,* 1580(10th Cir. 1995); *see also City of New Orleans v. Dukes,* 427 U.S. 297,303-04 (1976); *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 631-32 (Tex. 1996).

The Mayhews claim that they are not being treated the same as other property owners in the Town that have higher density properties. However, they are not similarly situated. A landowner seeking a zoning change for a 1200 acre development is not similarly situated to a landowner seeking to build on a small parcel of land. There is no showing that the Mayhews have been treated differently from other property owners seeking a planned development on their property.

The Mayhews also allege that the zoning ordinance has a disproportionate impact on racial minorities, thus invoking a suspect class. At trial, however, the Mayhews stipulated that they abandoned any "allegation of racial animus as a motivation for the actions either in regard to the planned development or in regard to the existing zoning which applies to the subject property." That stipulation applies in this Court as well.

Finally, the Mayhews claim that the Town's zoning ordinance was not rationally related to a legitimate government purpose. In analyzing this claim, we apply the same standards as to their substantive due process analysis. For the same reasons that we concluded that the Town's actions did not violate substantive due process, we conclude

that the Town has not violated the Mayhews' equal protection rights.

D. PROCEDURAL DUE PROCESS

If an individual is deprived of a property right, the government must afford an appropriate and meaningful opportunity to be heard to comport with procedural due process. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532,542(1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Accordingly, a plaintiff alleging a procedural due process takings claim must establish that he was deprived of notice and an opportunity to be heard with respect to a decision affecting his property rights. *Cf Anderson* v. *Douglas County*, 4 F.3d 574,578(8th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Harrington v. County of Sonoma*, 834 F.2d 1488, 1501 (9th Cir.), *mod~fled on other grounds*, 857 F.2d 567(9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989).

The Mayhews were given notice and an opportunity to be heard with respect to their development application. While the Mayhews complain that the procedure was unfair because the Town applied ad hoc unreviewable standards in snaking its determination and that the Town lacked the discretion to deny the application because it satisfied the applicable standards, this is not the proper inquiry. Zoning is a legislative act. *See, e.g.. Thompson* v. *City of Palestine, 510* S.W.2d 579, 581 (Tex. 1974). In making a legislative zoning determination, a city or town is entitled to consider all the facts and circumstances which may affect the property, the community, and the welfare of its citizens. *Cf City of El Paso v. Donohue*, 352 S.W.2d 713,716 (Tex. 1962). To satisfy the requirements of procedural due process, then, the Town must only provide notice and an opportunity to be heard, which it

did. We conclude that the Mayhews are not entitled to prevail on their procedural due process claims.

* * * *

We reverse the court of appeals' judgment dismissing the Mayhews' claims on ripeness grounds. Rather than dismissing their claims, we render a take-nothing judgment against the Mayhews because we hold that, as a matter of law, the Mayhews did not prevail on their just compensation takings claims, 'substantially advances' takings claims, substantive due process and due course claims, equal protection claims, and procedural due process and due course claims under the federal and state constitutions.

GREG ABBOTT
JUSTICE

OPINION DELIVERED: March 13, 1998

Appendix B

IN THE SUPREME COURT OF TEXAS

No. 95-0771

CHARLES MAYHEW, SR., CHARLES MAYHEW, JR., THE ESTATE OF AUDREY MAYHEW, AND SUNNYVALE PROPERTIES, LTD., PETITIONERS

v.

THE TOWN OF SUNNYVALE, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the Fifth District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The judgment of the court of appeals is reversed;

2) Judgment is rendered that Charles Mayhew, Sr., Charles Mayhew, Jr., The Estate of Audrey Mayhew, and Sunnyvale Properties, Ltd. take nothing from the Town of Sunnyvale;

3) The Town of Sunnyvale shall recover from Charles Mayhew, Sr., Charles Mayhew, Jr., The Estate of Audrey Mayhew. and Sunnyvale Properties, Ltd., who shall pay the costs in this Court and in the court of appeals.

A copy of this judgment and of the Court's opinion is certified to the Court of Appeals for the Fifth District and to the District Court of Dallas County, Texas, for observance.

(Opinion of the Court delivered by Justice Abbott)

March 13, 1998

* * * * * * *

Appendix C

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

(512) 463-1312

May 08, 1998

Mr. Don Black
714 Jackson Street, Suite 320
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Kansas City, MO 64112-3012

Mr. W. Alan Wright
Haynes & Boone
901 Main Street, 3100
Dallas, TX 75202-3789

RE: Case Number 95-077 1
Court of Appeals Number: 05-92-01401-CV
Trial Court Number: 87-3074-K

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

(512) 463-1312

Style: CHARLES MAYHEW, SR., CHARLES MAYHEW, JR., MAYHEW, THE ESTATE OF AUDREY MAYHEW, and SUNNYVALE PROPERTIES, LTD.
v.
THE TOWN OF SUNNYVALE

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin, Deputy

cc: Mr. Charles L. Siemon

Ms. Marcella Larsen
Mr. Robert H. Freilich

Appendix D

Charles MAYHEW, Sr., Charles Mayhew, Jr., The Estate of Audrey Mayhew, and Sunnyvale Properties, Ltd., Appellants,

v.

The TOWN OF SUNNYVALE, Eloise Patrick, Robert Sanders, Gordon Davis, and Carroll Brown, as Individuals, Appellees.

No. 05-88-00734-CV.
Court of Appeals of Texas,
Dallas.
June 9, 1989.
Rehearing Denied Aug. 9, 1989.

Developer whose application for development approval was denied by town, brought action against town and town officials, challenging the constitutionality of town's zoning ordinances. The 192nd District Court, Dallas County, Merrill Hartman, J., granted defendants' motion for summary judgment, and developer appealed. The Court of Appeals, Whitham, J., held that: (1) alleged violations of the Texas Zoning Enabling Act were cured by validation statutes; (2) the individual defendants were entitled to absolute immunity; and (3) a town councilman could not be compelled to testify.

Affirmed in part, and reversed and remanded in part.

[1] JUDGMENT k178
228k178
Function of summary judgment is not to deprive litigant of his right to full hearing on merits of any real issue of fact, but to

eliminate patently unmeritorious claims and untenable defenses.

[2] APPEAL AND ERROR k863
30k863
When defendant moves for summary judgment, question on appeal, as well as in trial court, is not whether summary judgment proof raises fact issues with reference to essential elements of plaintiff's claim or cause of action, but is whether summary judgment proof establishes as matter of law that there is no genuine issue of fact as to one or more of essential elements of plaintiff's cause of action.

[2] JUDGMENT k185(6)
228k185(6)
When defendant moves for summary judgment, question on appeal, as well as in trial court, is not whether summary judgment proof raises fact issues with reference to essential elements of plaintiff's claim or cause of action, but is whether summary judgment proof establishes as matter of law that there is no genuine issue of fact as to one or more of essential elements of plaintiff's cause of action.

[3] JUDGMENT k185(6)
228k185(6)
Defendant is entitled to summary judgment if he establishes, as matter of law, that at least one element of plaintiff's cause of action does not exist.

[4] JUDGMENT k185(2)
228k185(2)
Formerly 227k185(2)

Presumptions and burden of proof for ordinary or conventional trial are immaterial to burden that movant for summary judgment must bear.

[5] JUDGMENT k185(2)
228k185(2)
Extraordinary burden resting upon party challenging action of city council to show that action was illegal and void is burden for trial on merits, not on proceeding for summary judgment sought by city.

[6] JUDGMENT k181(15.1)
228k181(15.1)
Formerly 228k181(15)
Genuine issue of material fact, precluding summary judgment for town, existed as to whether town, by rejecting application for development approval, intended to prevent development of property in order to impose servitude to preserve natural and traditional character of land for benefit of public. Vernon's Ann.Texas Rules Civ.Proc., Rule 166-A(c).

[7] ZONING AND PLANNING k6
414k6
When general law city that has not previously adopted comprehensive plan seeks to adopt ordinance which would have effect of regulating use of land as distinguished from zoning, it may do so under its general police power.

[8] ZONING AND PLANNING k9
414k9
Texas Zoning Enabling Act applies to general law cities. V.T.C.A., Local Government Code s 211.001 et seq.

[9] ZONING AND PLANNING k159
414k159

Where municipality has separately adopted comprehensive zoning plan, that adopted comprehensive plan must serve as basis for subsequent zoning amendments. V.T.C.A., Local Government Code s 211.004.

[10] ZONING AND PLANNING k571
414k571
Developer whose application for development approval was denied had standing to challenge town's zoning ordinances as violating Zoning Enabling Act; in absence of town's zoning ordinances, developer would have had right to make such use of his property as he saw fit, provided that use did not operate to harm of others. V.T.C.A., Civil Practice & Remedies Code ss 37.003(a), 37.004(a).

[11] STATUTES k236
361k236
Validation acts are remedial and are to be liberally construed. Vernon's Ann.Texas Civ.St. art. 974d-36.

[12] ZONING AND PLANNING k153
414k153
Validation acts apply to amendatory zoning ordinances. Vernon's Ann.Texas Civ.St. art. 974d-36.

[13] MUNICIPAL CORPORATIONS k76
268k76
Although validation statutes may not cure constitutional defects in ordinances, they may cure defects that do not render ordinance unconstitutional. Vernon's Ann.Texas Civ.St. arts. 974d-36, 974d-36, ss 1, 3(b).

[14] ZONING AND PLANNING k153
414k153

Town ordinances which allegedly violated Texas Zoning Enabling Act were cured by validation statutes. Vernon's Ann.Texas Civ.St. arts. 974d-36, 974d- 36, ss 1, 3(b).

[15] JUDGMENT k181(15.1)
228k181(15.1)
Formerly 228k181(15)
Genuine issues of material fact, precluding summary judgment for city, existed as to whether doctrine of governmental function barred plaintiff's claims.

[16] CONSTITUTIONAL LAW k44.1
92k44.1
Formerly 92k44
Developer whose application for development approval was denied, and who subsequently challenged constitutionality of town's zoning ordinances, was not required to file notice of claims as to his state constitutional claims.

[17] DECLARATORY JUDGMENT k256
118Ak256
Nothing in Declaratory Judgment Act requires that, in challenges to constitutionality of ordinances, service be had on Texas Attorney General within particular period of time. V.T.C.A., Civil Practice & Remedies Code s 37.006(b).

[18] MUNICIPAL CORPORATIONS k170
268k170
Town officials acted in legislative capacity when they voted to deny application for planned development under zoning ordinance; thus, they were entitled to absolute immunity as against developer.

[19] CONSTITUTIONAL LAW k70.3(1)
92k70.3(1)

Judicial review of legislative action should be restricted to examination of language of law in question and official legislative records; individual legislators may not be questioned to determine evidence upon which they relied or their reasons for voting particular way.

[20] STATUTES k46
361k46
Subjective knowledge, motive, or mental process of individual legislator is irrelevant to determination of validity of legislative act because legislative act expresses collective will of legislative body.

[21] STATUTES k216
361k216
Public policy dictates that individual legislators be incompetent witnesses regarding law enacted by legislature as body.

[22] CONSTITUTIONAL LAW k70.3(1)
92k70.3(1)
Town councilman could not be compelled to testify concerning legislative action in action challenging constitutionality of town's zoning ordinance.

[22] MUNICIPAL CORPORATIONS k121
268k121
Town councilman could not be compelled to testify concerning legislative action in action challenging constitutionality of town's zoning ordinance.

***285** Robert D. Barbee, and Douglas A. Cawley, Johnson & Swanson, Dallas, Sarah C. Swanson, Larry Niemann, Niemann & Niemann, Austin, Charles L. Siemon, Andrew Stansell, Siemon, Larsen & Purdy, Chicago, Ill., for appellants.

N. Alex Bickley, Bickley & Associates, Robert F. Brown, Kenneth C. Dippel, Terrence S. Welch, Kent S. Hofmeister, Hutchison, Boyle, Brooks & Fisher, Dallas, for appellees.

Susan Mead, Thomas H. Keen, Dallas, for amicus curiae.

Before WHITHAM, LAGARDE and KINKEADE, JJ.

WHITHAM, Justice.

Denied a proposed planned development sought under the zoning ordinances of the appellee, The Town of Sunnyvale, the appellants, Charles Mayhew, Sr., Charles Mayhew, Jr., the Estate of Audrey Mayhew, and Sunnyvale Properties, Ltd. (Mayhew), brought this action against The Town of Sunnyvale and the additional individual appellees, Eloise Patrick, Robert Sanders, Gordon Davis, and Carroll Brown (the town), challenging the town's zoning ordinances on ten counts. Mayhew appeals from a summary judgment in favor of the town. Mayhew filed no motion for summary judgment. We conclude that the town's alleged violations of the Texas Zoning Enabling Act were cured by validation statutes. Insofar as the trial court's judgment denies Mayhew any relief for the town's violation of the Texas Zoning Enabling Act, we affirm the trial court's judgment. We conclude that the individual defendant-appellees, Eloise Patrick, Robert Sanders, Gordon Davis, and Carroll Brown are entitled to absolute immunity. Insofar as the trial court's judgment denies Mayhew any relief against the appellees, Eloise Patrick, Robert Sanders, Gordon Davis, and Carroll Brown, we affirm the trial court's judgment. We conclude that the trial court did not err in denying Mayhew's first motion to compel testimony from town councilman Robert Sanders. We conclude, therefore, that we need not reverse

the trial court's judgment because of error in denying Mayhew's first motion to compel testimony from town councilman Robert Sanders. We conclude that the town, as defendant-movant for summary judgment has failed to establish as a matter of law that there is no genuine issue of material fact as to one or more of the essential elements of Mayhew's multiple causes of action grounded on federal and state constitutional claims. Insofar as the trial court's judgment denies Mayhew any relief against the Town of Sunnyvale on any of Mayhew's federal and state constitutional claims, we reverse the trial court's judgment and remand the cause for trial on the merits of Mayhew's federal and state constitutional claims. Accordingly, we affirm in part and reverse in part and remand the cause to the trial court for trial on the merits of Mayhew's federal and state constitutional claims.

The Genuine Issues of Material Fact Inquiry

The present case offers numerous complex and difficult questions for resolution. We do not attempt to discuss all of the asserted genuine issues of material fact briefed by the parties. However, there exists at least one genuine issue of material fact that we consider to be at the heart of this controversy. That fact issue is central to a principal inquiry of whether the town at this point has done anything to give rise to any of Mayhew's federal and state constitutional claims. As trial on the merits unfolds, we are confident that the trial court and the parties will better come to grips with any and all other disputed fact issues necessary to be determined by a fact finder. Certainly, this case illustrates the difficulty presented in attempting by way of summary judgment to dispose of complex and difficult lawsuits involving federal and state constitutional claims.

[1][2][3][4][5] We begin by repeating well-known rules governing the summary judgment practice. The function of a summary judgment is not to deprive a litigant of his right to a full hearing on the merits of any real issue of fact, but to eliminate patently unmeritorious claims and untenable defenses. Gulbenkian v. Penn, 151 Tex. 412, 415-16, 252 S.W.2d 929, 931 (1952). The standards for reviewing a motion for summary judgment are well established. As mandated by the Supreme Court of Texas, they are as follows: 1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. ***287** 2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. 3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. Nixon v. Mr. Property Management, 690 S.W.2d 546, 548-49 (Tex.1985). It is not the purpose of the summary judgment rule to provide either a trial by deposition or a trial by affidavit, but rather to provide a method of summarily terminating a case when it clearly appears that only a question of law is involved and that there is no genuine issue of fact. Gaines v. Hamman, 163 Tex. 618, 626, 358 S.W.2d 557, 563 (1962). Moreover, when the defendant is the movant, as in the present case, we must be alert to additional rules controlling the summary judgment practice. The question on appeal, as well as in the trial court, is not whether the summary judgment proof raises fact issues with reference to the essential elements of a plaintiff's claim or cause of action, but is whether the summary judgment proof establishes as a matter of law that there is no genuine issue of facts as to one or more of the essential elements of the plaintiff's cause of action. Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 (Tex.1970). Therefore, a defendant is entitled to a summary judgment if he establishes, as a matter of law, that at least one

element of plaintiff's cause of action does not exist. See Rosas v. Buddies Food Store, 518 S.W.2d 534, 537 (Tex.1975). Furthermore, on a governmental body's motion for summary judgment the presumption of validity accorded governmental decisions cannot be used to affirmatively sustain the movant's burden. The presumptions and burden of proof for an ordinary or conventional trial are immaterial to the burden that a movant for summary judgment must bear. Missouri-Kansas-Texas R.R. v. City of Dallas, 623 S.W.2d 296, 298 (Tex.1981). The extraordinary burden resting upon a party challenging an action of a city council to show that the action was illegal and void is a burden for trial on the merits, not on a proceeding for summary judgment sought by the city. See Bliss v. City of Fort Worth, 288 S.W.2d 558, 563 (Tex.Civ.App.--Fort Worth 1956, writ ref'd n.r.e.).

With these principles in mind, we look to the summary-judgment proof for the background to the present controversy. Mayhew is the owner of approximately 1,200 acres of vacant land in the town. The property is regularly shaped and from a geotechnical perspective is suitable for suburban development. The town is a suburb of the City of Dallas situated between the cities of Garland and Mesquite, approximately twelve miles east of the central business district of the City of Dallas, and is accessible by Interstate 30 to the north and by Interstate 20 to the south. The town contains approximately 10,941 acres of land, of which approximately 8,190 is vacant. There are about 675 existing residences in the town and the majority of those residences are developed on lots of less than one acre. In 1965, the town adopted a comprehensive plan and zoning ordinance that provided for the future growth and development of the town. The 1965 plan and zoning ordinance provided for a variety of residential development types including multifamily residences and single family lot sizes as small as 12,000 square feet. In 1973, in

response to a problem with septic tank failures in small lot subdivisions, the town amended its zoning ordinance to require a minimum lot size of one acre. Subsequently, sanitary sewer was made available to lands within the town, including Mayhew's property, obviating the need for larger lots to accommodate drainage fields. However, the one acre minimum lot requirement was not repealed. Nor was there any effort to amend the town's comprehensive plan to delete the multifamily forms of residential development and single family housing at densities of up to 3.5 dwelling units per acre from the town's official plan. As a result, all of Mayhew's property, although zoned in three separate zoning districts, is limited to single family residences with a minimum lot size requirement of one acre, even though the town's comprehensive plan provides for a variety of residential densities ***288** for Mayhew's property. In the twelve years since the one acre lot requirement had been in place, only 160 residences have been developed on one acre lots. More than 8,000 acres of vacant land in the town is subject to the town's one acre requirement.

In 1985, Mayhew inquired as to whether the town would consider a planned development under article XV of the town's zoning ordinance, which purported to allow more intensive residential development for well-planned developments. Article XV provides in part: I. INTENT and PURPOSE. The intent of the Planned Development District (PD) is to provide a flexible, alternative zoning procedure to encourage imagination and innovative design for the unified development of large tracts of land, within overall use regulations set forth in this ordinance, the general land use plan, the thoroughfare plan, and the goals and policies of the development of the Town. The PD District is designed to allow the planned association of different land use such as residential developments of mixed housing, estates, golf

courses, green belts, equestrian trails and centers, or office parks, or any appropriate combination of these uses which may be planned, developed or operated as a unified development. Town officials, including members of the town council, encouraged Mayhew to pursue a high quality planned development, especially one with a golf course. After more than a year of cooperative work with the town, including extensive input from the town's consulting land planner and the expenditure of more than $500,000 for studies and analyses, Mayhew filed an application on July 3, 1986, for development approval for what was to be known as the Mayhew Ranch Planned Development (the "application"). The application for planned development and supporting materials proposed a range of development intensities with various types of housing units arranged around more than 300 acres of common or open space including a golf course. As was the practice of the town, the application for the Mayhew Ranch Planned Development was referred to the town's consulting planner for review. The consulting planner concluded that the application met the requirements for a planned development under article XV of the town's zoning ordinance. The consulting planner, in fact, included the proposed planned development in the updated comprehensive plan he produced for the town because he believed it was a superior plan for the use of the property in terms of sound and responsible planning. Mayhew met or exceeded each of the enumerated requirements for a planned development. Nevertheless, in the face of "political" opposition from residents of the town (most of whom live on lots of less than one acre) the town council denied the application for development approval on January 13, 1987. In the mayor's words because "we just couldn't get it together." The reasons for opposition to the planned development were two-fold: first, the residents like having the Mayhew property as "free" open space; and second, the possibility that "undesirable

persons" might move into the town if the Mayhew Ranch Planned Development were approved.

[6] In multiple points of error, Mayhew contends, inter alia, that the town violated his federal and state constitutional rights to procedural due process, substantive due process, and equal protection, and that the town's decision effected a taking of his property without payment of just or adequate compensation. Mayhew grounds these claims on the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 19 of the Texas Constitution (procedural and substantive due process); the Fourteenth Amendment and article I, section 3 of the Texas Constitution (equal protection); The Fifth and Fourteenth Amendments and article I, section 17 of the Texas Constitution (taking without payment of just or adequate compensation); and Texas Revised Civil Statutes articles 1011b and 1011c (now recodified as sections 211.004, 211.005, and 211.013 in the Texas Local Government Code). The claims were brought pursuant to sections 1983 and 1988 of title 42 of the United States Code and sections 37.003 and 65.011 ***289** of the Texas Civil Practice and Remedies Code. Central to Mayhew's contentions is the argument that public outcry or demands caused the town to take his property and not the public health, safety, and welfare. In this connection, we recognize a basic concept of private property ownership. While property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922) (emphasis added).

Mayhew does not challenge the town's right to zone. Instead, Mayhew contends that the town's zoning activities have "stonewalled" him to the point that he can do nothing with his property that will satisfy the town, thus leaving him holding legal title to 1200 acres of unimproved land, taken and used, however, by the residents of the town as desired open space necessary to afford the residents a rustic environment in which to live. [FN1] In the language of the United States Supreme Court, Mayhew insists that it will be a very curious and unsatisfactory result if it shall be held that if the government refrains from the absolute conversion of real property for the public use it can destroy the property's value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject the property to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. See Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. (13 Wall.) 166, 177-80, 20 L.Ed. 557 (1872). We agree.

FN1. Amicus curiae, The Lupshire Company, tells us that it is the owner of approximately 1,042 acres of land located in the town and that it is also an unsuccessful applicant for a zoning change in the town, having received a final denial from the town council on April 10, 1989. Lupshire also tells us that like Mayhew, the Lupshire request involved a tract of land over 1,000 acres, large enough to be self-sustaining and self-contained, was for residential uses on lots less than one acre, and was involved in the zoning process for more than a year, at a cost of several hundred thousand dollars.

The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions

upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. Mahon, 260 U.S. at 415, 43 S.Ct. at 160, per Mr. Justice Holmes. The present case focuses upon whether the natural tendency of human nature to which Mr. Justice Holmes refers remains alive and well. Thus, in the present case it must ultimately be determined whether the town has left open the door for Mayhew to make new application under article XV of the town's zoning ordinance or closed the door to further applications. If the door is closed, then Mayhew cannot develop his land. A property owner need not engage in futile reapplications. See MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 2568 n. 8, 91 L.Ed.2d 285 (1986). Mayhew insists that a genuine issue of material fact exists as to whether the town has closed the door. We agree.

In doing so, we find instructive the Supreme Court's decision in City of Austin v. Teague, 570 S.W.2d 389 (Tex.1978). In Teague, local residents appeared before the city council and urged the council to stop further development of Teague's land and asked the council to take steps to have the site preserved as a scenic easement bordering the southern approach to downtown. Teague applied to the city for a permit required to proceed with preparation of the land for development. The city denied the application. So it went with Teague's second and third applications. Teague sued the city for damages for inverse condemnation ***290** of his land. [FN2] Teague, 570 S.W.2d at 390-91. From the Court of Civil Appeals' opinion in Teague we know that it is a fact question whether a municipality refuses to allow development

with the intention to prevent all development of a tract and preserve it as an easement for the benefit of the public. We quote the opinion of the Court of Civil Appeals:

FN2. Inverse condemnation, i.e., uncompensated taking of property. Murmur Corp. v. Board of Adjustment of Dallas, 718 S.W.2d 790, 809 (Tex.App.--Dallas 1986, writ ref'd n.r.e.) (Whitham, J., concurring).

Trial was to a jury which found: Issue 1. Defendant thru [sic] its course of conduct between January 1973 and June 26, 1975, refused to allow plaintiffs to alter the portions of Harpers Branch and the Ramble which cross plaintiffs' tract of 8.51 acres with the intention to prevent all development of that tract and preserve it as a scenic easement for the benefit of the public. City of Austin v. Teague, 556 S.W.2d 400, 401 (Tex.Civ.App.--Waco 1977), rev'd on other grounds, 570 S.W.2d 389 (Tex.1978) (emphasis added). In this connection, we observe that the issue of intent is not susceptible to being readily controverted and is best left to the determination of the trier of fact. See Futerfas v. Park Towers, 707 S.W.2d 149, 157 (Tex.App.--Dallas 1986, writ ref'd n.r.e.). Returning to the Supreme Court's opinion in Teague, we note that the Supreme Court concluded that the landowners demonstrated to both the jury and the trial court that the City of Austin, by rejecting the third application for a Waterway Development Permit, sought to impose a servitude upon the property to preserve "the natural and traditional character of the land and waterway"--that is, the city wanted to use plaintiffs' land as a scenic easement on the southern approach to the City of Austin. Teague, 570 S.W.2d at 394. In reaching this conclusion, the Supreme Court reasoned that at the time the city denied the third application for a permit, Teague lost all use of his land; the city by indirection acquired the scenic easement at no cost which it had

recommended that the State Highway Department acquire by purchase. In doing so it also singled out Teague to bear all of the cost for the community benefit without distributing any cost among the members of the community. Teague, 570 S.W.2d at 394.

With Teague in mind, we next consider Mayhew's summary judgment evidence said to raise a genuine issue of material fact as to whether the town refused to allow development with the intention to prevent all development of Mayhew's land and preserve it as open space to afford the town's residents a rustic environment in which to live. In short, we now discuss Mayhew's evidence asserted to show that the town closed the door to a further application in order to preserve Mayhew's land as a scenic natural park for the benefit of the public. We conclude that the judicial system must have this factual circumstance resolved before it can decide whether Mayhew's property has been taken. See Yolo County, 106 S.Ct. at 2567-69. The town would have us view the summary judgment proof as showing that Mayhew walked through the door of the town hall on January 13, 1987, presented the town with an all or nothing proposition, and then proceeded to bring this action when his application was denied. We conclude that the summary judgment proof tells us more.

Mayhew's application was considered for a period of more than six months. Mayhew had initiated discussions with the town in regard to the proposed development more than a year prior to the town's decision, meeting with town officials on more than twenty occasions prior to submitting the application. Mayhew worked closely with representatives of the town, including the town planner, in coming up with an acceptable design proposal, spending over one-half of one million dollars in providing information and studies to provide

information showing that the proposed development satisfied the requirements of the town's planned development ordinance and would be an asset to the town. In November of 1986, about half way through this process, the town decided to revise its comprehensive plan by substantially decreasing ***291** the amount of density that would be permitted in the town, all while Mayhew's application was pending. Subsequently, Mayhew's representatives met with town officials, including the town attorney, the town manager, council member Brown, and council member Sanders, to discuss the proposed development. At that meeting, Mayhew agreed to scale down the application substantially from the 5,025 units originally sought to 3,600 dwelling units and to abandon the apartments because of the town's "concerns" over the inclusion of apartments and other forms of low and moderate cost housing in the proposed development. In the end, Mayhew acceded to the demands of the town officials. But when the time came for the town council to vote on the application, the town council balked, and considered and then rejected an entire range of development proposals with densities between 1.0 and 2.93 dwelling units per acre. Indeed, the record shows that the town council considered and rejected countless other alternatives and permutations of the development proposals presented by Mayhew. Thus, in the face of "political" opposition from residents of the town, the town council denied the application for development approval on January 13, 1987. In the mayor's words, because "we just couldn't get it together."

In the event that the summary judgment proof can be said to raise genuine issues of material fact, the town advances the "debatable or issuable doctrine." The town argues that the doctrine "stands for the proposition that a proponent of a zoning ordinance or land use decision is entitled to summary judgment as to the validity of the

ordinance or decision where conditions either conclusively support the passage of the ordinance or land use decision, or make the passage of the ordinance or land use decision issuable or debatable." (Emphasis added). The "debatable or issuable" language is said to have been used by the Texas Supreme Court in Baccus v. City of Dallas, 454 S.W.2d 391, 392 (Tex.1970), relied upon by the town. The Supreme Court agreed with our holding that, to prevail in a conventional trial on the merits, the burden is on a contestant to show that no conclusive or even controversial facts or conditions exist which offer support for action of a city's governing body in amending a zoning ordinance. Baccus, 454 S.W.2d at 392. A contestant has the same burden when he seeks a summary judgment invalidating an ordinance. However, that is not the rule for determining whether the proponents of such an ordinance are entitled to a summary judgment sustaining its validity. Baccus, 454 S.W.2d at 392. In moving for a summary judgment, proponents have the burden of establishing affirmatively by summary judgment proofs that conditions either conclusively support passage of the ordinance or make that action debatable or issuable. Only thus may the proponents establish validity of the ordinance as a matter of law as is required by Rule 166- A(c), of the Texas Rules of Civil Procedure. Baccus, 454 S.W.2d at 392. The Supreme Court then went on to describe summary judgment proof necessary to establish that the city's action was debatable or issuable. The evidence before the council raised issues over which reasonable men could differ. Baccus, 454 S.W.2d at 392.

We do not read Baccus to hold that, if reasonable men could differ as to the intent of a municipality in refusing to allow land development, no genuine issues of material fact exist on motion for summary judgment. We do not read Baccus to so hold for three reasons. First, we note that

whether the town can take Mayhew's property without paying for it is not "debatable and issuable." From what has been said above, inverse condemnation is not permitted. Therefore, there is nothing over which reasonable men can differ sitting as town council. Second, we reason that if the "debatable or issuable doctrine" was applicable in a case of inverse condemnation, the Supreme Court would have told us so in Teague. The Supreme Court did not. Instead, the Supreme Court treated the municipality's intent to be a question for the fact finder. Third, the Supreme Court tells us the limits of the "debatable and issuable doctrine" in summary judgment cases involving land use decisions. See City of Univ. Park v. Benners, 485 S.W.2d ***292** 773 (Tex.1973), also relied upon by the town. In both Baccus and Benners, both parties filed motions for summary judgment. Benners is instructive. As to the city's motion for summary judgment, the rule for determining whether the proponents of a zoning ordinance are entitled to a summary judgment sustaining its validity is different from that of a contestant of the ordinance. Proponents are under the burden of establishing by summary judgment proof that conditions either conclusively support passage of the ordinance or make that action debatable or issuable. Benners, 485 S.W.2d at 781. The Supreme Court then indicates that "debatable or issuable" applies in situations in which cross-motions are made. The Supreme Court elaborates. "Our view is that the conditions shown by the summary judgment evidence establishes that, at the least, the legislative action of the governing body of the City in enacting the ordinances was issuable. Respondent does not contend for a remand for the development of further facts, no doubt in recognition that the summary judgment record presents the salient facts of the controversy." Benners, 485 S.W.2d at 781. Therefore, facts are not debatable or issuable if both parties are standing on the summary judgment record as providing the necessary facts of the controversy. As noted,

the present case is not one in which cross-motions were filed. Mayhew filed no motion for summary judgment. Indeed, in the third case relied upon by the town as mentioning the "debatable or issuable doctrine," there was only the city's motion for summary judgment. See Albert v. City of Addison, 566 S.W.2d 298 (Tex.1978). In Albert, the Supreme Court declined to apply the doctrine. "The City argues that the judgment of the Court of Civil Appeals is nevertheless sustainable because even if the proper burden of proof rule is applied, it has established its right thereto as a matter of law. We disagree." Albert, 566 S.W.2d at 299. "The summary judgment proofs of the City do not meet the requirements of Bliss v. City of Fort Worth, 288 S.W.2d 558 (Tex.Civ.App.-- Fort Worth 1956, writ ref'd n.r.e.), in that they fail to show what matters were considered by the City Council at the meeting in which it took the action complained of here." Albert, 566 S.W.2d at 299. At this point, we repeat our above citation to Bliss. The extraordinary burden resting upon a party challenging an action of a city council to show that the action was illegal and void is a burden for trial on the merits, not on a proceeding for summary judgment sought by the city. See Bliss, 288 S.W.2d at 563. Consequently, we conclude that the "debatable or issuable doctrine" has no application in the disposition we make of Mayhew's appeal of summary judgment in favor of the town. We emphasize that such disposition is based on Mayhew's contention of a "taking" asserted to be inverse condemnation and the existence of a genuine issue of material fact as to the town's intention. With the "debatable or issuable doctrine" behind us, we return to the genuine issues of material fact inquiry on the summary judgment record before us. In this connection, we are mindful that merely because the facts are undisputed does not always eliminate the right to a fact finding. If reasonable minds can draw different inferences or conclusions from undisputed facts, a fact issue is presented. Commercial

Standard Ins. Co. v. Davis, 134 Tex. 487, 137 S.W.2d 1, 2 (1940).

On motion for summary judgment, the movant-town has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Moreover, in deciding whether there is a disputed material fact issue precluding summary judgment, we must treat evidence favorable to Mayhew as true and we must indulge every reasonable inference in favor of Mayhew and resolve any doubts in Mayhew's favor. Nixon, 690 S.W.2d at 548-49. Applying these rules, we conclude that the summary judgment proof establishes a genuine issue of material fact as to whether the town, by rejecting Mayhew's application, intended to prevent Mayhew's development of his property in order to impose a servitude upon the property to preserve the natural and traditional character of the land for the benefit of the public. See Teague, 570 S.W.2d at 394. Although other fact issues ***293** may exist as to one or more of Mayhew's claims, this "intent" fact is the linchpin of Mayhew's claims that he has suffered deprivation of federal and state constitutional rights to procedural due process, substantive due process and equal protection, and a taking of his property without payment of just or adequate compensation. We conclude, therefore, that the town, as defendant-movant for summary judgment, has failed to establish as a matter of law that there is no genuine issue of material fact as to one or more of the essential elements of Mayhew's multiple federal and state constitutional claims. Consequently, we conclude further that the trial court erred in granting the town's motion for summary judgment as to Mayhew's federal and state constitutional claims. We sustain Mayhew's points of error one through five and seven through nine. In doing so, we express no opinion on the merits of any of Mayhew's federal and state constitutional claims. The disposition of the merits

of those claims awaits trial on the merits. Moreover, our conclusion that a genuine issue of material fact exists is not to be read as holding that no other fact issues exist or as suggesting the wording of any question submitted to the jury. The existence or not of other fact issues and the wording of any question or questions submitted to the jury, if there be a jury, are in the first instance to be resolved by the trial court.

Matters Asserted to Support the Trial Court's Judgment in Whole or in Part

We now turn to Mayhew's points of error addressing defensive issues raised by the town on its motion for summary judgment. We must decide the town's defensive issues because the trial court granted the town's motion for summary judgment in its entirety without explanation.

In its sixth point of error, Mayhew contends that the trial court erred in granting summary judgment (1) because the Texas Zoning Enabling Act (Texas Revised Civil Statutes article 1011a, et seq., now recodified in the Texas Local Government Code sections 211.001, et seq.) applies to the town as a matter of law, (2) because the town's zoning ordinance was not made in accordance with a comprehensive plan (3) because Mayhew has standing to challenge the validity of the ordinance and (4) because violations of the Act are not cured by validation acts. Mayhew alleged that the town's zoning ordinance is void because the ordinance failed to comply with the requirements of the Texas Zoning Enabling Act. The town moved for summary judgment, contending that the Texas Zoning Enabling Act did not apply to them, that the town did not have to adopt the required plan, that Mayhew was without standing to challenge the town's failure to comply with the Texas Zoning Enabling Act, and that it did not matter that the town violated the Texas Zoning Enabling Act because validation statutes cured these defects. We conclude that none of the town's first three contentions have merit and that the trial court erred as a matter of law if it determined that any of them were "well taken." We conclude further, however, that the town's fourth argument as to validation statutes has merit.

[7][8] Application of the Texas Zoning Enabling Act to the town. The town first argues that because the town is a general law city, the Texas Zoning Enabling Act does not apply to the town, citing City of Brookside v. Comeau, 633 S.W.2d 790 (Tex.1982), cert. denied 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1986). A plain reading of City of Brookside, however, shows that the case actually stands for the proposition that when a general law city that has not previously adopted a comprehensive plan seeks to adopt an ordinance which would have the effect of regulating the use of land as distinguished from "zoning," it may do so under its general police power. City of Brookside, 633 S.W.2d at 793 & n. 4 (mobile home regulation). We conclude that City of Brookside does not hold that a city that undertakes to impose "zoning" regulations is free to ignore the dictates of the Texas Zoning Enabling Act. The courts of this State have held ordinances and amendments to ordinances invalid where the express, mandatory provisions of our zoning statute have ***294** not been complied with. Bolton v. Sparks, 362 S.W.2d 946, 950 (Tex.1962). It is undisputed that the town has a comprehensive plan, that it has had such a plan since 1965, that the regulations at issue are "zoning" regulations, and indeed, that the town's zoning ordinance expressly provides that it was made in accordance with a comprehensive zoning plan. Hence, we do not read City of Brookside to mean that the town is free to ignore the requirements mandated by the Texas Zoning Enabling Act when it undertakes zoning. It is undisputed that the town is a general law city and it is well settled that under the Texas Constitution, general law cities possess only those powers chartered by general law. See TEX. CONST. art. XI, s 4 (cities with populations of 5,000 and less). We conclude that articles 1011b and 1011c of the Texas Revised Civil Statutes (now recodified as sections 211.004, 211.005, and 211.013 of the Local Government Code) apply to general law cities, and therefore, the town, a

general law city, must comply with the statutory requirements of these statutes. A general law city must look to general law for its authority to exercise municipal powers. Texas law is settled that general law cities derive their authority to exercise governmental powers from general law itself. See, e.g., Hope v. City of Laguna Vista, 721 S.W.2d 463, 463-64 (Tex.Civ.App.--Corpus Christi 1986, writ ref'd n.r.e.) (general law city possesses only those powers and privileges conferred by law). Next, it is also settled that the Texas Zoning Enabling Act, a general law, applies to general law cities as a matter of law. See, e.g., Coffee City v. Thompson, 535 S.W.2d 758, 763-67 (Tex.Civ.App.--Tyler 1976, writ ref'd n.r.e.) (invalidating the zoning ordinance of the Town of Coffee City, a general law city with a population of less than 1,000, in its entirety for failure to comply with the requirements of article 1011 et seq.); Massengale v. City of Copperas Cove, 520 S.W.2d 824, 828 (Tex.Civ.App.--Waco 1975, writ ref'd n.r.e.) (non-home rule city must look to article 1011 et seq. for authority to enact zoning regulation); City of San Antonio v. Lanier, 542 S.W.2d 232, 234 (Tex.Civ.App.--San Antonio 1976, writ ref'd n.r.e.) (Texas municipalities derive their power to zone exclusively from the enabling statutes, article 1011a, et seq.). Thus the trial court erred as a matter of law if it concluded that the town may zone without consideration of the Texas Zoning Enabling Act.

Ordinance made in accordance with a comprehensive plan. Texas statutes require that zoning be "in accordance with a comprehensive plan" (see article 1011c, TEX.REV.CIV.STAT.ANN.) and have contained this requirement since 1927. The zoning enabling acts of most other jurisdictions also contain this requirement, which is derived from the Standard State Zoning Enabling Act (U.S. Dep't Commerce, 1924). See Haar, In Accordance With A Comprehensive Plan, 68 HARV.L.REV. 1154, 1158 (1955).

Mayhew alleged that the town's zoning ordinance was not made in accordance with a comprehensive plan and that the ordinance itself is not a comprehensive plan. The town argues in response that article 1011c does not mean what it says, that the zoning map which is a part of its ordinance constitutes a comprehensive plan, and that the map and ordinance were "dispositive" of whether there was an existing plan. The thrust of Mayhew's challenge (and article 1011c), however, is not whether there was "an existing plan" but whether the zoning ordinance that was adopted was made in accordance with a comprehensive plan.

[9] Mayhew recognizes that Texas courts, in responding to challenges that zoning is invalid because of a local government's failure to adopt a comprehensive plan, have found comprehensive, coherent, and logical zoning ordinances themselves sufficient to satisfy the "in accordance with " requirement. See, e.g., Benners, 485 S.W.2d 773, passim (geographic comprehensiveness); Coffee City v. Thompson, 535 S.W.2d 758 (Tex.Civ.App.-- Tyler 1976, writ ref'd n.r.e.) (substantive comprehensiveness). But that is not the case where a municipality has a separately adopted comprehensive plan. In such a case, the law is settled that the adopted comprehensive plan must, by statutory mandate, serve as ***295** the basis for subsequent zoning amendments: A comprehensive zoning ordinance is law that binds the municipal legislative body itself. Art. 1011c. The legislative body does not, on each rezoning hearing, redetermine as an original matter, the city's policy of comprehensive planning. The law demands that the approved zoning plan should be respected.... The duty to obey the existing law forbids municipal actions that disregard not only the pre-established zoning ordinance but also the long-range master plans and maps that have been adopted by ordinance. City of Pharr v. Tippitt, 616 S.W.2d 173, 176-77 (Tex.1981) (emphasis

added) (citations omitted). It is apparent that the town's ordinance fails to meet the requirements of article 1011c in both respects because, on the record in this cause, it is clear that the town already had a separate comprehensive plan which it chose to ignore in adopting its 1983 zoning ordinance.

The facts of the present case are that the town adopted a comprehensive plan in 1965 and that the town's zoning ordinance was amended in 1973 to require a minimum lot size of one acre for all single family detached dwellings without regard to, and creating a pattern that is patently inconsistent with the 1965 plan. Perhaps the most egregious example of this inconsistency lies in the fact that while the 1965 plan allocated a substantial portion of the town's area to single family uses on lots with an average size of 12,000 square feet (3.6 dwelling units per acre), the 1983 zoning ordinance requires that such uses be on lots that are not smaller than 43,560 square feet (1 acre). And while the 1965 plan allocated approximately 93 acres for multiple family use, the 1983 ordinance does not permit the construction of such housing in any part of the town. Further, the record shows that the 1965 plan was still in effect when the town adopted its zoning ordinance in 1983. The record further demonstrates that the 1983 zoning ordinance was not made in accordance with, and in fact obviously and directly conflicted with, the town's adopted comprehensive plan. Indeed, the town's own planner testified in his deposition that the zoning ordinance was not made in accordance with a comprehensive plan. We conclude that the 1973 amendment requiring a minimum lot size of one acre violated the requirement that zoning be made in accordance with a comprehensive plan. Nor can there be any doubt that the zoning applied to Mayhew's property is irrational and unsupported by a logical or coherent comprehensive plan. Indeed, uncontroverted

evidence adduced by the town shows that in 1986, when the town council recognized that the sound planning of the 1965 plan and the comprehensive plan report prepared by its professional consultant conflicted with the town's predilection for one acre zoning, the town directed its consultant to remove all substance from the so-called plan that was ultimately adopted in November 1986. Shortly thereafter, the draft comprehensive plan was substantially amended at the direction of the town council to remove all references to density. This kind of after-the-fact justification of pre-judged ideas is the antithesis of comprehensive planning and fundamental fairness. Indeed, we decline to approve the concept that pre-ordained results dictated by political hue and cry can be sound planning. Hence, the trial court erred as a matter of law if it concluded that the town's zoning ordinance was made in accordance with a comprehensive plan.

[10] Mayhew's standing to challenge violation of article 1011b. Mayhew alleged that the town's zoning ordinance violates article 1011b in that the ordinance is not uniform for each class or kind of building in each district. The town raises the argument that Mayhew does not have standing to challenge the ordinance. We disagree. The Declaratory Judgment Act authorizes any person whose rights are affected by a municipal ordinance to seek a declaration of the "rights, status, and other legal relations whether or not further relief is or could be claimed." TEX.CIV.PRAC. & REM.CODE ANN. ss 37.003(a) & 37.004(a) (Vernon 1986). It has long been recognized that everyone has a fundamental ***296** right to use their property, subject only to the lawful exercise of the police power. See, e.g., Lynch v. Household Finance Corp., 405 U.S. 538, 552, 92 S.Ct. 1113, 1121, 31 L.Ed.2d 424 (1972). In the absence of the town's zoning ordinance, Mayhew would have the right to make such use of his property as he saw fit, provided that the use did not operate

to the harm of others. We conclude that the use of Mayhew's property has been and continues to be affected by the challenged zoning provisions and that he is entitled not to have the reasonable use of his property interfered with by a regulation failing to comply with state law. We conclude further, therefore, that Mayhew has standing to seek a declaration of whether the town's zoning ordinance is in compliance with article 1011b. Hence, it follows that the trial court erred as a matter of law if it concluded that Mayhew did not have standing to challenge the town's alleged violation of article 1011b.

[11][12][13][14] Validation statutes and violations of the Texas Zoning Enabling Act. We begin by noting Mayhew's posture on appeal concerning this issue. Mayhew tells us in his brief that "[t]he Original Petition alleged that the [town's zoning ordinance] is void because the ordinance failed to comply with the requirements of the Texas Zoning Enabling Act." Hence, compliance with state statute is the issue; not the statute's constitutionality. Although Mayhew insists that the town's challenged zoning ordinance was not made in accordance with a comprehensive plan as required by the Texas Zoning Enabling Act, we must now decide if subsequent validation statutes deny Mayhew his cause of action based on failure to comply with the state statute. We conclude that the challenged zoning ordinance is not subject to attack on the grounds of the town's failure to comply with the Texas Zoning Enabling Act. We reach this conclusion because since the town's challenged action, the legislature has enacted validating statutes. The current validating statute became effective May 20, 1987. TEX.REV.CIV.STAT.ANN. art. 974d-36 (Vernon Supp.1989). The validating statutes apply to a town operating under general law. Article 974d-36, section 1. Article 974d-36 provides in section 3(b) that all governmental

proceedings performed by the governing bodies of all such cities and towns and their officers since their incorporation are validated as of the date of such proceedings. Mayhew argues that a validation statute may not be used to cure substantive defects such as those alleged in the present case. We disagree. Validation acts are remedial and are to be liberally construed. Murmur Corp. at 793. They apply to amendatory zoning ordinances. Murmur, 718 S.W.2d at 793. Although validation statutes may not cure constitutional defects, they may cure defects that do not render the ordinance unconstitutional. Murmur, 718 S.W.2d at 793. As noted, Mayhew asserts no constitutional defect. Because the irregularity challenged by Mayhew did not affect a constitutional right, we conclude it was the intention of the legislature to cure this type of defect and that the alleged violation of the Texas Zoning Enabling Act was validated. See Murmur, 718 S.W.2d at 793. Hence, it follows that the trial court did not err as a matter of law if it concluded that the town's alleged violations of the Texas Zoning Enabling Act were cured by validation statutes. Insofar as the trial court's judgment denies Mayhew any relief for the town's violation of the Texas Zoning Enabling Act, we overrule Mayhew's sixth point of error and affirm the trial court's judgment in part. We sustain the remainder of Mayhew's sixth point of error. Our disposition of Mayhew's sixth point of error is not to be read as affirming the trial court's judgment as to Mayhew's claims for violations of federal and state constitutional rights to procedural due process, substantive due process, and equal protection, and as to Mayhew's claim that the town's decision effected a taking of his property without payment of just or adequate compensation.

[15] In his tenth point of error, Mayhew contends that the trial court erred in granting summary judgment for the town because the doctrine of governmental function does not

bar Mayhew's claims. Mayhew's *297 claims can be divided into three categories: (1) federal constitutional claims, (2) state constitutional claims, and (3) state statutory claims. In its brief the town tells us that "[the town does] not challenge [Mayhew's] assertion that the doctrine of governmental function does not bar federal and state constitutional claims, but that doctrine does bar [Mayhew's state statutory claims] and the trial court correctly dismissed those claims." We have earlier found that Mayhew has no state statutory claims. We read the town's brief to tell us that it agrees that the doctrine of governmental function does not bar Mayhew's remaining federal and state constitutional claims. Hence, it follows that the trial court erred if it concluded that the doctrine of governmental function barred Mayhew's federal and state constitutional claims. We sustain Mayhew's tenth point of error insofar as it applies to Mayhew's federal and state constitutional claims.

[16] In his eleventh point of error, Mayhew contends that the trial court erred in granting summary judgment for the town because Mayhew's claims lie outside the scope of sovereign immunity and are not subject to notice of claim procedures. The town's motion for summary judgment was also based in part on the assertion that Mayhew was barred from recovering damages under state law because Mayhew allegedly failed to file a notice of claim. We have earlier found that Mayhew has no state statutory claims. In its brief, the town tells us that it "has never contended that a notice of claim must be filed relative to alleged federal law violation; however, [Mayhew] must file a notice of claim with [the town] for [Mayhew's] alleged state constitutional violations." We read the town's brief to tell us that it agrees that Mayhew need not file a notice of claim relative to its federal constitutional claims. Therefore, the sole issue before us is whether Mayhew must file a notice of claim as to his state

constitutional claims. In San Antonio River Authority v. Garrett Brothers, 528 S.W.2d 266 (Tex.Civ.App.--San Antonio 1975, writ ref'd n.r.e.), the plaintiff sought damages for inverse condemnation under article I, section 17 of the Texas Constitution. Garrett, 528 S.W.2d at 272. The charter provision requiring the giving of a notice of claim of injury is not applicable to a case of this nature. Garrett, 528 S.W.2d at 274. Hence, it follows that the trial court erred if it concluded that Mayhew was required to file a notice of claim as to its federal and state constitutional claims. We sustain Mayhew's eleventh point of error insofar as it applies to Mayhew's federal and state constitutional claims.

[17] In his twelfth point of error, Mayhew contends that the trial court erred in granting summary judgment for lack of jurisdiction because Mayhew has complied with the requirements of the Declaratory Judgment Act as a matter of law. The town's motion for summary judgment was also based in part on the assertion that the trial court was without jurisdiction to render declaratory or injunctive relief because Mayhew did not comply with the requirements of the Declaratory Judgment Act in regard to serving a copy of the Original Petition on the Texas Attorney General. The Texas Declaratory Judgment Act provides that if a municipal ordinance is alleged to be unconstitutional, "the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard." TEX.CIV.PRAC. & REM.CODE ANN. s 37.006(b) (Vernon 1986). It is undisputed that the Texas Attorney General was served with a copy of the proceeding on or about February 2, 1988, and that an appearance was filed on behalf of the State of Texas on or about March 4, 1988, prior to the hearing on the town's motion. We conclude that nothing in the Act requires that service be had within a particular period of time. The appearance filed on behalf of the State unambiguously shows

that the Attorney General has declined to participate in this action because the constitutionality or validity of a state statute has not been challenged. Although the town argued that service was insufficient because an unreasonable amount of time had elapsed before notice was given, it is clear that courts have taken a different view of this matter ***298** and have held that "Texas requires only substantial compliance with section 11 [now 37.006(b)] of the Declaratory Judgments Act." City of Garland v. Louton, 691 S.W.2d 603, 605 (Tex.1985). Hence, it follows that the trial court erred if it concluded that it lacked jurisdiction because Mayhew failed to comply with the requirements of the Declaratory Judgment Act in regard to serving a copy of the original petition on the Texas Attorney General. We sustain Mayhew's twelfth point of error.

[18] In his thirteenth point of error, Mayhew contends that the trial court erred in granting summary judgment for the individual defendants because genuine issues of material fact exist and the individual defendants were not entitled to judgment as a matter of law. Mayhew alleged that the individual defendants violated Mayhew's federal and state constitutional rights in denying his application for planned development. The thrust of Mayhew's contention is that the individual defendants knew that Mayhew's application complied with each of the requirements of article XV of the zoning ordinance but nevertheless voted to deny for reasons other than those established by article XV. The individual defendants seek to avoid judicial review of their actions by claiming that they acted in a legislative capacity in applying the previously established standards of article XV to Mayhew's application and that they were therefore entitled to absolute immunity. In the alternative, the defendants urged that they were entitled to qualified immunity because they acted in the scope of their immunity with the good faith belief

that their actions were lawful. Mayhew tells us in his brief that "[f]ederal law provides an absolute immunity from liability for a specified class of government officials engaging in a narrowly drawn class of activities, and the act of legislation has long been recognized as an activity warranting such immunity. See Harlow v. Fitzgerald, 457 U.S. 800, 807, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1980)." Thus, we reach the question of whether the individual defendants acted in a legislative capacity when they voted to deny Mayhew's application for planned development under article XV of the zoning ordinance. When a zoning body acts on an individual request, it is motivated by legislative concerns--its role is to decide the best course for the community and not necessarily to adjudicate the rights of contending parties. Mahone v. Addicks Util. Dist., 836 F.2d 921, 934 (5th Cir.1988). We conclude, therefore, that the individual defendants acted in a legislative capacity. Therefore, the individual defendants are entitled to absolute immunity. Consequently, the individual defendants were entitled to judgment in their favor as a matter of law. Hence, it follows that the trial court did not err if it concluded that the individual defendants were entitled to judgment in their favor as a matter of law. We overrule Mayhew's thirteenth point of error and affirm the trial court's judgment as to Eloise Patrick, Robert Sanders, Gordon Davis, and Carroll Brown in their individual capacities.

A Discovery Issue

[19][20][21][22] In his fourteenth point of error, Mayhew contends that the trial court erred in denying his first motion to compel testimony from town councilman Robert Sanders. The dispute centers on Sanders's argument that he should not be made to testify concerning legislative action. We agree. Judicial review of legislative action should be restricted to examination of the language of the law in question and official legislative records. Sosa v. City of Corpus Christi, 739 S.W.2d 397, 405 (Tex.App.--Corpus

Christi 1987, no writ). Individual legislators may not be questioned to determine the evidence upon which they relied or their reasons for voting a particular way. Sosa, 739 S.W.2d at 405. These principles are consistent with the basic doctrine that the subjective knowledge, motive, or mental process of an individual legislator is irrelevant to a determination of the validity of a legislative act because the legislative act expresses the collective will of the legislative body. Sosa, 739 S.W.2d at 405. Furthermore, public policy dictates that individual legislators be incompetent witnesses regarding a law enacted by the ***299** legislature as a body. Legislators' hands must not be bound by a possibility of being haled into court to testify any time a legislative action is questioned. Sosa, 739 S.W.2d at 405. We conclude, therefore, that the trial court did not err in denying Mayhew's first motion to compel testimony from town councilman Robert Sanders. We overrule Mayhew's fourteenth point of error.

For the above reasons, we affirm the trial court's judgment in part and we reverse the trial court's judgment in part and remand the cause to the trial court for trial on the merits of Mayhew's federal and state constitutional claims.

Appendix E

Reversed and Rendered and Opinion Filed May 10, 1994

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-92-01401-CV

THE TOWN OF SUNNYVALE, Appellant

V.

CHARLES MAYHEW, SR., CHARLES MAYUEW, JR., THE ESTATE OF AUDREY MAYHEW, AND SUNNYVALE PROPERTIES, LTD., Appellees

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On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. 87-3074-K

OPINION

Before Justices Thomas, Ovard, and Morris
Opinion By Justice Ovard

This case involves a challenge to a zoning decision. The Town of Sunnyvale appeals the trial court's judgment awarding Charles Mayhew, Sr., Charles Mayhew, Jr., the Estate of Audrey Mayhew, and Sunnyvale Properties, Ltd. (the Mayhews) $5 million in damages, $2,301,369.20 in prejudgment interest, $1,204,374.13 for attorneys' fees for services rendered through trial, $100,000 in attorneys' fees in the event of an appeal to this Court, costs in the amount of $175,038.14, as well as injunctive relief allowing the Mayhews to develop their property under their original planned-development proposal. The Town attacks the trial court's judgment on several grounds by challenging the trial court's findings of fact and conclusions of law. In twenty-three points of error, the Town contends the claims were not ripe and that the trial court erred in entering judgment for the Mayhews. Specifically, in points of error one through four, the Town asserts that the trial court lacked jurisdiction to consider the Mayhews' taking, substantive-due-process, and equal-protection claims[9] because these claims were not ripe for review. In point of error nineteen, the Town challenges the legal and factual sufficiency of the evidence to support various findings made by the trial court. Because the Mayhews failed to reapply for development or seek variances, their claims

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[9] The Mayhews brought facial claims regarding substantive and procedural due process and a facial equal protection claim, but the trial court did not find the ordinance facially unconstitutional.

were not ripe for review. Consequently, we reverse the judgment of the trial court and dismiss the Mayhews' claims.

FACTS AND PROCEDURAL HISTORY

From 1941 to 1986, the Mayhews acquired 1196 acres of property located in the Town.[10] They sought to develop their property in 1986. At that time, all residentially zoned property was subject to a minimum lot size requirement of one dwelling unit per acre. The Town adopted one-unit-per-acre zoning in 1973 because of septic tank problems.

In 1985, the Mayhews met with various Town officials regarding a planned development for which they sought approval. The Mayhews had never sought a change in the existing agricultural-use zoning of their property until that time. The Mayhews told the Town a planned development would not be feasible under the current one-unit-per-acre zoning. In 1986, after meeting with the Mayhews, the Town adopted a new comprehensive plan providing for a population of 25,000 by the year 2006.[11] The Town also amended article XV of the Town's zoning ordinance to permit planned developments with homes built on less than one acre.

The Mayhews paid more than $500,000 to conduct studies and prepare reports evaluating various aspects of the planned development. In July 1986, the Mayhews gave the planned development application to the Town's planning and

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[10] The total acreage in the Town was approximately 11,500 acres.

[11] There was evidence at trial that the Town could not meet this population projeciton if the Town continued its one-unit-per-acre zoning because development would occur very slowly. There was evidence that the market for homes on one-acre lots is small.

zoning committee for preliminary review. At that time, the Mayhews' application said they requested approval for the building of 3650 to 5025 units. Two months after the Mayhews submitted their application to the planning and zoning committee, the Town passed a moratorium on planned developments. The Town, however, continued to process the Mayhews' application.

The Town's planning and zoning committee recommended that the Town Council vote to deny the application. In a memorandum, the committee said the proposed density was too high, the availability of adequate sewer service was uncertain, the public facilities were inadequate, the fiscal impact was negative, and there was a potential for an adverse impact on community characteristics. The memorandum further reported that a proposal with less density would be "preferred."

After the planning and zoning committee recommended denial, the Mayhews met with Town officials. The Mayhews said they would submit the planned development application to the Town Council requesting approval for 3600 total units (slightly more than three units per acre). The Mayhews submitted the application for a planned development (PD application) to the Town Council in December 1986. The Town Council denied the Mayhews' PD application on January 13, 1987. The Mayhews did not reapply; nor did they utilize procedures for obtaining variances contained in the Town's zoning ordinance. The Mayhews did not contact officials from the Town after the Town Council denied the application. Instead, on March 6, 1987, approximately two months after the Town denied their PD application, the Mayhews instituted this suit.

Three days after the Mayhews filed suit, the Town passed another moratorium on planned developments. That moratorium lasted four months. At some time after the Mayhews ified suit, their neighbors, the Luptons, filed a PD application. The Town processed that application. The Town later denied the Luptons' application.

The trial court initially granted summary judgment in favor of the Town, from which the Mayhews appealed. This Court affirmed the summary judgment in favor of the Town regarding statutory violations alleged by the Mayhews. *See Mayhew v. Town of Sunnyvale,* 774 S.W.2d 284, 299 (Tex. App.--Dallas 1989, writ denied), *cert. denied,* 498 U.S. 1087 (1991) *(Mayhew I).* This Court further found, however, that issues of material fact existed. We reversed the summary judgment on the constitutional grounds and remanded the cause to the trial court regarding these issues and the issue of ripeness. In that opinion, we stated, "If the door [to further development applications] is closed, then [the Mayhews] cannot develop [their] land. A property owner need not engage in futile reapplications." *Mayhew I,* 774 S.W.2d at 289.

This appeal is from the trial on the merits. The Mayhews' theory at trial regarding ripeness was that the Town's denial of their PD application and their neighbors' PD application and the imposition of the moratoria together established it would be useless or futile to reapply for development. As set forth above, the trial court entered judgment in favor of the Mayhews. - The trial court entered the following findings of fact and conclusions of law applicable to ripeness.

Findings of Fact

101. In denying the application for planned development approval for the Mayhew Ranch Planned Development and the application for planned development approval for the [Luptons'] Planned Development, and in enacting numerous moratoria on applications for consideration of planned development approval, the Town of Sunnyvale has acted pursuant to an official policy not to allow development with a density of greater than one dwelling unit per acre.

130. The Town of Sunnyvale considered and rejected countless alternative densities during the consideration of the application for Planned Development Approval for Mayhew Ranch Planned Development and permutations to the density originally proposed by plaintiffs.

131. The actions of the Town of Sunnyvale reveal a pattern and practice which demonstrates the intent of the Town of Sunnyvale to deny any application for development approval with a density greater than one dwelling unit per acre.

132. Plaintiffs have exhausted all of the possible remedies and avenues of relief which were realistically available to them in the Town of Sunnyvale.[12]

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[12] Exhaustion of remedies is conceptually distinct from the finality or ripeness requirement. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985). To the extent that this finding and conclusion of law number 186 are conclusions of law that the Mayhews' claims are ripe, this issue is addressed below.

133. The Town of Sunnyvale has closed the door on future reapplications by Plaintiffs at a realistic or economically viable density.

Conclusions of Law

186. Plaintiffs have exhausted all of the possible remedies and avenues of relief which were realistically available to them in the Town of Sunnyvale.

187. The Town of Sunnyvale has closed the door on future reapplications by Plaintiffs at a realistic or economically viable density thus rendering the possibility of reapplication futile.

188. Reapplication by Plaintiffs for planned development approval with Defendant Town of Sunnyvale would have been, and is still, futile..

189. When the Town Council considered the application for planned development approval for the Mayhew Ranch Planned Development, the Town Council had the authority to and did consider and reject each and every level of density between one [1] and four and two-tenths [4 2110] dwelling units per acre.

190. This case was ripe for adjudication.

APPLICABLE LAW

1. Standard of Review -- Findings and Conclusions

Findings of fact in a case tried to the court have the same force and dignity as a jury's verdict upon special issues. *City of Clute v. City of Lake Jackson,* 559 S.W.2d 391, 395 (Tex. Civ. App.--Houston [14th Dist.] 1977, writ ref d n.r.e.). Findings of fact are not conclusive, however, when a complete statement of facts appears in the record. *Middleton v. Kawasaki Steel Corp.,* 687 S.W.2d 42, 44 (Tex. App.--Houston [14th Dist.]), *writ ref d n.r.e.* 699 S.W.2d 199 (Tex. 1985) (per curiam); *Stephenson v. Perlitz,* 537 S.W.2d 287, 289 (Tex. Civ. App.--Beaumont 1976, writ ref d n.r.e.). An appellant may attack the trial court's findings of fact on both legal and factual sufficiency grounds. *See Valencia v. Garza,* 765 S.W.2d 893, 896 (Tex. App.--San Antonio 1989, no writ).

A conclusion of law is reviewable as a question of law. *Mercer v. Bludworth,* 715 S.W.2d 693, 697 (Tex. App.--Houston [1st Dist.] 1986, writ ref d n.r.e.), *overruled on other grounds by Shumway v. Horizon Credit Corp.,* 801 S.W.2d 890, 894 (Tex. 1991). An appellant may not challenge a trial court's conclusions of law for factual insufficiency. However, an appellate court may review the trial court's conclusions drawn from the facts to determine their correctness. *Id.* If an appellate court determines a conclusion of law is erroneous, but the judgment rendered was proper, the erroneous conclusion of law does not require reversal. *Scholz v. Heath,* 642 S.W.2d 554, 559 (Tex. App.--Waco 1982, no writ).

2. Standard of Review - - Legal Sufficiency Points

A legal sufficiency point is a "no evidence" point presenting a question of law. *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965). In reviewing a "no evidence" point of error, we consider only the evidence and inferences supporting the trial court's finding. We disregard all contrary evidence and inferences. *Best v. Ryan Auto Group, Inc.*, 786 S.W.2d 670, 671 (Tex. 1990). We uphold the trial court's findings unless: (1) there is a complete absence of evidence to support the fact found; (2) the rules of law or evidence prohibit giving weight to the only evidence offered to prove the fact; (3) the evidence in support of the fact amounts to no more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of the fact. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 795 n.3 (Tex. 1991). If we sustain a "no evidence" point and the proper procedural steps have been taken, we may disregard the finding under attack and render judgment for the appellant unless, in the interest of justice, another trial is required. *Garza*, 395 S.W.2d at 823.

3. Standard of Review -- Factual Sufficiency Points

In reviewing factual sufficiency points, we consider all of the evidence, including any evidence contrary to the judgment. *Burnett v. Motyka*, 610 S.W.2d 735, 736 (Tex. 1980) (per curiam). We cannot set aside a finding unless it is so contrary to the overwhelming weight of the evidence that it is clearly wrong and unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam). In reversing for factual insufficiency, the court of appeals must detail the evidence relevant to the issue in consideration and clearly state why the finding is factually insufficient. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, *635* (Tex. 1986) (op. on reh'g).

4. Land-Use Regulation Challenges -- Generally

A plaintiff seeking to challenge a local government's refusal to rezone his property may bring causes of action for a taking without due process, a taking without just compensation, denial of substantive due process, and denial of the right to equal protection of the laws. *See Executive 100, Inc. v. Martin County,* 922 F. 2d 1536, 1540 (11th Cir.), *cert. denied,* 112 5. Ct. *55* (1991). Local zoning decisions that violate a land owner's constitutional rights may give rise to claims for relief under 42 U.S.C. section 1983. *See Spence v. Zimmerman,* 873 F.2d 256, *258* (11th Cir. 1989); *Brady v. Town of Colchester,* 863 F.2d 205, 209-10 (2d Cir. 1988).

5. Ripeness

"Ripeness" is a question of timing. *See Binker v. Pennsylvania,* 977 F.2d 738, 753 (3d Cir. 1992). Federal courts view this doctrine as an offshoot of the case or controversy requirement under Article III of the federal constitution. Courts also characterize the doctrine as a prudential limitation on federal jurisdiction. *See Taylor Inv. Ltd. v. Upper Darby Township,* 983 F.2d 1285, 1289 (3d Cir.), *cert. denied,* 114 5. Ct. 304 (1993). Texas courts also apply the ripeness doctrine. *See City of El Paso v. Madero Dev.,* 803 S.W.2d 396, 400 (Tex. App.--El Paso 1991, writ denied), *cert. denied,* 112 5. Ct. 970 (1992). The primary issue the ripeness doctrine addresses is when a proper party may bring an action. *See Armstrong World Indus., Inc. v. Adams,* 961 F.2d 405, 411 (3d Cir. 1992). Ripeness is a question of law. *See Hoehne v. County of San Benito,* 870 F.2d 529, 531 (9th Cir. 1989).

The ripeness doctrine avoids premature adjudication and prevents courts from entangling themselves in abstract disagreements over administrative policies. It also protects the administrative agencies from judicial interference until the agency formalizes an administrative decision and the challenging parties feel the effects of the decision in a concrete way. *See Madero,* 803 S.W.2d at 398-99. The ripeness doctrine involves the issue of jurisdiction of the subject matter and power to render a particular relief. *See id.* at 399. The ripeness issue regarding land-use regulations concerns whether courts can determine what types of uses a regulatory body will permit for the property.

It follows from the nature of a regulatory takings claim that an *essential prerequisite* to its assertion is a *final and authoritative determination of the type and intensity of development legally permitted* on the subject property. A court cannot determine whether regulation has gone 'too far' unless it knows how far the regulation goes.

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986) ..(emphasis added). The same standards may also apply to equal protection, substantive due process, and procedural due process claims. *See Herrington v. County of Sonoma,* 857 F.2d 567, 569 & n.1 (9th Cir. 1988) *(Herringron II), cert. denied,* 489 U.S. 1090 (1989).

a. Takings Claims

The United States Supreme Court has referred to a regulation that "goes too far" as a taking. *Williamson County Regional Planning Comm'n. v. Hamilton Bank,* 473 U.S.

172,186 (1985); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). However, that Court made it clear that takings claims are not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. *See Williamson*, 473 U.S. at 186. Generally, a final decision requires at least (1) rejection of a development plan, and (2) denial of a variance. See *id.* at 188-91; *Hoehne*, 870 F.2d at 534. The ripeness doctrine requires the plaintiff to apply for a variance to establish to what extent the regulatory body will permit development.[13] Only after application and the denial of a variance can a court determine whether the regulation has gone "too far." *See Eide v. Sarasota County*, 908 F.2d 716, 725 n.16. (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991).

The only way to avoid the final-decision requirement is if attempts to comply with the requirement would be futile. A property owner generally cannot rely on the futility exception until he or she makes at least one meaningful application for development. *See MacDonald*, 477 U.S. at 353 n.8. One application may be enough to establish that the regulatory body made a final decision if it is clear the regulatory body will deny all further applications for use or development. *See AA. Profiles, Inc. v. City of Forr Lauderdale*, 850 F.2d 1483, 1487 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989).

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[13] The term "variance" is not definitive or talismanic. If other types of permits or actions are avialabel and could provide similar relief, a landowner must seek them. *See Southern Pac.*, 922 F.2d at 503; *Hoehne*, 870 F.2d at 533-35 (discussing availability of relief via conditional-use permits, zoning changes, general plan amendments).

In *Williamson County,* the plaintiff brought an action pursuant to 42 U.S.C. section 1983 alleging that a county planning commission had taken its property without just compensation. *Williamson,* 473 U.S. at 182. The United States Supreme Court first construed the plaintiff's complaint "as stating a claim under the Just Compensation Clause" and then dismissed the complaint because it was not ripe for adjudication, holding as follows:

> because [the plaintiff] has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulation to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, [the plaintiff's] claim is not ripe.

Id. at 186. The Court found the plaintiff had not obtained a "final decision" because the plaintiff:

> *did not seek variances that would have allowed it to develop the properzy according to its proposed plat,* notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and subdivision regulations. It appears that variances could have been granted to resolve at least five of the Commission's eight objections to the plat. The Board of Zoning Appeals had the power to grant certain variances from the zoning ordinance . . . [and] had the power to grant variances from the

> subdivision regulations . . . . Indeed, the Temple Hills Committee had recommended that, the Commission grant variances from those regulations. Nevertheless, [the plaintiff] did not seek variances from either the Board or the Commission.

Id. at 187-88 (emphasis added). The Court concluded as follows:

> [The plaintiff] has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. - Although "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the *regulations at issue to the particular land in question.*

Id. at 190-91 (emphasis added) (citations omitted).

The Court then addressed the plaintiff's claim under the due process theory that a "regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment." *Id.* at 197. The Court similarly dismissed the complaint as premature, holding it was not ripe for the same reasons. *Id.* at 199-200.

b. Equal Protection and Substantive Due Process Claims

Whether the same ripeness standard that applies to takings claims also applies to equal protection and substantive due process claims depends on the way the plaintiff asserts those claims at trial. *See Eide*, 908 F.2d at 725 n.16; *Herrington II*, 857 F.2d at 569. Where a cause of action for substantive due process violations, in effect, relates to the same issues and involves the same facts as the takings claim, courts have applied the two-pronged final decision rule used in takings cases. *See Herrington II*, 857 F.2d at 569. In *Elde*, the Eleventh Circuit said courts should apply the same "takings" ripeness standard to equal protection, substantive due process, and takings claims where the plaintiff contends the regulatory body deprived the landowner of all use of his or her property. *Eide*, 908 F.2d at 725 n.16. Courts have also held the same ripeness requirement applies in all cases involving as-applied challenges to regulatory takings, whether based on the just compensation clause, the due process clause, or the equal protection clause. *See Southern Pac. Transp. Co. v. City of LosAngeles*, 922 F.2d 498, 507 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 382 (1991); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 379 (9th Cir.), *cert. denied*, 488 U.S. 851 (1988).

c. The Futility Exception

Futility is an exception to the ripeness doctrine. Courts may review land-use regulations after only one denial, and a landowner need not reapply where reapplication would be useless or futile. *See MacDonald,* 477 U.S. at 352 n.8; *Agins,* 447 U.S. at *259-60.* Courts have not clearly articulated the precise test regarding when the **futility** exception applies. Courts hold it is futile to request a variance if the land-use regulation does not permit variances. *See Herrington II,* 857 F.2d at 569-70. A landowner may also establish futility by showing that, after the regulatory body denied one application, it more restrictively zoned the property. *See Hoehne,* 870 F.2d at *535.* Moreover, a landowner may establish futility by showing that the regulatory body rejected a sufficient number of prior applications. *See American Say. & Loan Ass'n v. Mann County,* 653 F.2d 364, 371 (9th Cir. 1981) (citing *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 116 & n.17 (1978)). The landowner must make at least one "meaningful application." This requirement does not mean that if the regulatory body rejects one "exceedingly grandiose" development plan application, this indicates the body will reject all other land-use applications. *See MacDonald,* 477 U.S. at 354 n.9. The futility exception applies where the manner in which the regulatory body rejects the first application makes it clear it will not approve any project. *See Southern Pac.*, 922 F.2d at 504 & n.7.

APPLICATION OF THE LAW TO THE FACTS

1. Ripeness

a. Due Process and Just Compensation Takings Claims

In its first and fourth[14] points of error, the Town contends the trial court incorrectly concluded that the Mayhews' takings claims were ripe for review. The record reflects that the Town's zoning ordinance then in effect provided for procedures to obtain planned development approval for development at greater than one unit per acre. The ordinance also provided for procedures to obtain special-use permits and variances from existing zoning. The record reflects that the Mayhews did not ifie another PD application or an application for variances. The Mayhews do not dispute the fact that they filed only one formal PD application before filing suit.

The Mayhews brought a due process takings claim and a just compensation claim pursuant to 42 U.S.C. section 1983 in their First Amended Original Petition. They alleged the application of the Town's zoning ordinance and the denial of their PD application deprived them of all economically viable use of their land in violation of their right to due process. They alleged damages in excess of $15,000,000 and asked for an injunction prohibiting the Town from enforcing the ordinance against them. The Mayhews had the burden to show their claims were ripe. *See Madero,* 803 S.W.2d at 400-0 1; *Lake Nacimiento Ranch Co. v. San Luis Obispo County,* 841 F.2d 872, 876 (9th Cir. 1987), *cert. denied,* 488 U.S. 827 (1988).

The trial court concluded there was a taking and that the Mayhews' claims were ripe. We conclude, however, that the claims were not ripe. The claims could not be ripe for determination until the government entity charged with implementing the regulations reached a final decision

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[14] In point of error four, the Town contends all of the Mayhews' claims were not ripe.

regarding the application of its regulations to the property at issue. *Williamson County*, 473 U.S. at 186. Because the Mayhews did not reapply for development or seek to develop their property by obtaining variances, they did not establish that the Town made a final decision regarding what development the Town would permit on their property. *See MacDonald*, 477 U.S. at 353 n.8. This Court does not know how far the Town's regulations go, and we conclude the claims are premature. *See Williamson County*, 473 U.S. at 186-87.

b. Substantive Due Process and Equal Protection Claims

In its second, third, and fourth points of error, the Town contends the trial court incorrectly concluded that the Mayhews' substantive due process and equal protection claims were ripe for review. In their petition, the Mayhews pleaded that the Town's ordinance, as applied to them, denied them substantive due process and equal protection.[15] Under both of these claims, the Mayhews complained of the use of their property, stating that, "As a result of the decision of the Town Council of the Town of Sunnyvale and the resulting continued application of an unconstitutional zoning ordinance of the Town of Sunnyvale to the plaintiffs and the use of plaintiff's property, plaintiffs have suffered injury . . .

The *MacDonald* reapplication requirement applies to the Mayhews' substantive due process and equal protection claims because, as the Mayhews allege these claims, they complain that the Town's use of their property injured them. The Mayhews also argued at trial that the Town's actions

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[15] Under their equal protection claims, the Mayhews complained that the ordinance, as applied to them, prohibited the construction of a planned unit development.

deprived them of all beneficial use of their property. *See Elde*, 908 F.2d at 725 n.16. They contended they could not derive a profit even from agricultural use. Regarding these claims, they argued that the Town used their property as a "park" and converted it to permanent open space for the public. They further argued at trial that the evidence regarding their equal protection and substantive due process claims was the same as that supporting their takings claim.

We see no reason to treat the Mayhews' substantive due process and equal protection claims differently from their takings claim because (1) under each cause of action they complain of the use of their property; (2) the damages alleged for their substantive due process and equal protection claims are the same as for their takings claim; (3) the Mayhews alleged an amount of damages under all three claims ($15,000,000) that would, based on their evidence, compensate them for a complete taking; (4) the Mayhews based their complaints at trial on the contention that the Town did not permit them an economically viable use for their property; and (5) under their equal protection and substantive due process claims, the Mayhews sought money damages for the total loss of the property rather than just an injunction and perhaps some money damages, the usual remedy for such claims. All of the Mayhews' as-applied claims turn on issues regarding the deprivation of their property due to land-use regulations applied to the property. *See id.: see also Herrington II, 857* F.2d at *569* n.1. Therefore, these as-applied claims are not ripe until the Mayhews make further application to the Town regarding permitted uses for their property. *See Eide*, 908 F.2d at 725 n.16; *see also Southern Pac.*, 922 F.2d at 507.

2. Futility

The Mayhews contended at trial that it was futile to reapply for development approval. The trial court's conclusions of law regarding futility are as follows:

> 187. The Town of Sunnyvale has closed the door on future reapplications by Plaintiffs at a realistic or economically viable density thus rendering the possibility of reapplication futile.
>
> 188. Reapplication by Plaintiffs for planned development approval with Defendant Town of Sunnyvale would have been, and is still, futile.

In its argument under points of error one through four, the Town contends the trial court's conclusions of law regarding futility are incorrect. The Town contends the Mayhews did not meet their burden to prove reapplication would be useless or futile. *See MacDonald,* 477 U.S. at 353 n.8; *Agins,* 447 U.S. at 259-60; *see also Samaad v. City of Dallas,* 940 F.2d 925, 934 (5th Cir. 1991) (burden of proof).

The record reflects that after the planning and zoning committee recommended that the Town deny the Mayhews' PD application, Charles Mayhew, Jr. (Chuck) met with some Town officials and two Town Council members. Chuck testified that at the meeting, the Mayhews offered compromises and agreed to decrease the proposed density in the PD application from the requested range of 3650 to 5025 units to a total of 3600 units. The Mayhews also offered to pay for additional development costs and expenses.

James Northrup, a land developer who worked with the Mayhews to put together their PD application, testified

that the Mayhews did not reapply to the Town because (1) the Town put a moratorium on planned developments; (2) the Town decided against reconsidering their PD application; (3) the Town also rejected the Luptons' PD application; (4) the citizens of the Town elected some "strident [one-unit-per-acre development] supporters" after the Town rejected the Mayhews' PD application; and (5) the Mayhews had already gone through "eighteen months of negotiations" with the Town. He further testified the Mayhews believed reapplying was futile because "they knew they had an agreement [with the council members they met with] and then they saw [the PD application] denied."

Chuck testified that the Mayhews' plan was to sell their property to the Trammel Crow Company (Crow) for development. He said the planned development would have been feasible with a density of less than 3600 units if the Town paid some development costs.[16] The Mayhews said in their pleadings that they told Town officials that 3500 was the minimum number of units that would make the development economically feasible. They further pleaded that Town officials asked them for an analysis regarding the costs the Town would have to pay to reduce the number of units to

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[16] At trial, witnesses for the Mayhews testified regarding whether the planned development would be economically viable or feasible at less thank the density requested in their only application: 3600 units. Several witnesses testified that it would be a "close case" whether development at less than 3600 would be economically viable. Most witnesses indicated that development at slightly less than 3600 units could be economically viable.

3000.[17] The Mayhews did not resubmit a plan with reduced density after the denial.

Chuck testified that, after the denial, he did not speak to any Town officials about reconfiguring the application with different densities or different amenities. He said he told the Town officials that the lowest density the Mayhews would agree to was 3600 units, unless the Town paid some development costs.

Chuck testified that he did not have an opinion regarding whether development at 3500 units would be economically viable, and then said he did not think it would be. He agreed that he said during his deposition that a development at 3500 units would be economically viable if the Town paid some development costs. He said the number "3500" was a typographical error in his deposition, and he meant "3600." He said no market exists for the sale of the Mayhews' land.

Chuck said other developers besides Crow negotiated with the Mayhews regarding development. Chuck testified that no one called trying to purchase the property since the Town denied their PD application. He said the Mayhews did not advertise the property and did not hire anyone to try to sell it after the denial. He called two or three companies in an attempt to sell the land and was not successful. He said he did not make contingency plans in case the Town denied the PD

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[17] There was no evidence in the record that the Mayhews submitted an application with decreased density or that they asked the Town to pay some development costs to achieve the reduced density requested by the Town.

application. He said that, after the denial of the application, the Mayhews talked to one company about using the property as a dump or a racetrack, although neither use ever occurred.

Chuck testified that, before the denial, another development company sought to enter into a joint venture with the Mayhews to develop the property. He said the Mayhews did not want to risk being part of such a joint venture. Instead, the Mayhews sought to sell the property "outright." Chuck said the developer, Bellamah, a subsidiary of New Mexico Power and Light, offered to enter into the development joint venture with the Mayhews. Bellamah was to contribute cash in an amount equal to the value of the land contributed by the Mayhews. The two groups were to share the profits. The Mayhews viewed the joint venture as being more "risky" than the sale of the property to Crow.

John Taylor Boyd, a real estate broker, testified for the Mayhews. He said Crow negotiated with the Mayhews to purchase the Mayhews' property for $23 million for development purposes. Boyd worked with Crow and the Mayhews regarding the proposed sale. He testified that Crow would not develop the property at less than 3600 units because Crow would not "do" a community without adding "fancy stuff." Crow would not go below 3600 units because Crow would not be able to make a profit and still put in "beautiful corridors" and other "fancy" amenities.

Michael Smiley, a land planner testifying for the Mayhews, testified that the Mayhews intended to develop their land to be like Highland Park, with high levels of quality

and abundant landscaping. He said Highland Park is an upper-income area.

Much of the evidence at trial concerned the viability of the Mayhews' PD application. There was little or no evidence regarding other possible uses for the property. The Mayhews did not submit applications for variances for other uses. The evidence regarding the Town's denial of the Mayhews' PD application does not establish futility. *See MacDonald*, 477 U.S. at 347. We cannot consider the Mayhews' claims until they obtain a final decision regarding what land use the Town may permit.

The Mayhews assert that they should not be required to reapply for any land use that involves a density of less than 3600 units, the density they requested. However, as stated by the United States Supreme Court, in *MacDonald:*

> *The denial of* [a particular plan for relatively intense residential development] *cannot be equated with a refusal to permit any development. . . . Land use planning is not an all or nothing proposition. A governmental entity is not required to permit a landowner to develop properry to* [thej *full extent he might desire or be charged with an unconstitutional taking of property.* Here, . . . the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development.

Id. (emphasis added) (quoting lower court opinion).

Similarly, in *Baytree of Inverray Realty Partners v. City of Lauderhill,* a developer alleged a takings claim because the city refused to grant its application to amend the existing zoning. It sought to build a 327-unit residential apartment complex on its property. The Eleventh Circuit Court of Appeals said:

> Baytree has only been told that it cannot build a 327-unit residential apartment complex on its property. It has not been told that no development of its property is allowed. That Baytree may not be able to develop exactly what it originally wanted does not mean that its investment-backed expectations are eradicated.
>
> * * *
>
> "Neither deprivation of the most beneficial use of land, nor a severe decrease in the value of property, measures up to an unlawful taking."

Baycree of Inverrary Realty Partners v. City of Lauderhill, 873 F.2d 1407, 1410 (11th Cir. 1989) (citation omitted). Therefore, denial of the Mayhews' application did not establish futility.

The Mayhews next contend reapplication is futile because individual members of the Town Council have so indicated. Chuck testified that the Town has never granted a variance from one-unit-per-acre development since the Town

implemented that zoning.[18] The Mayhews contended at trial that the new council members would not have voted to approve any amended application.

Several witnesses also testified that investors assume the Town will deny all development applications. They said the Town's denial of the Mayhews' PD application indicates the Town will not approve any development. However, the Town Council acts as a governing body, and this Court will not consider the statements of individual members regarding how they have voted or may vote when deciding whether the Town will approve any formal applications for development or variances.[19] *See Madero,* 803 S.W.2d at 401; *Mayhew I,* 774 S.W.2d at 298-99; *see generally Sosa v. City of Corpus Christi,* 739 S.W.2d 397, 404-05 (Tex. App. --Corpus Christi 1987, no writ) (holding that individual city council members may not testify regarding their individual mental processes, indicating "good faith" of council, which acts as whole, cannot be shown by such testimony). The Mayhews' informal endeavors to obtain approval of their development plans do not constitute a formal application, which is required for finality. *See Madero,* 803 S.W.2d at 401. The result of local elections also does not establish that the Town Council would reject further applications for development or for variances. We further hold that testimony about the Town's "mood" and

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[18] Robert Ewalt, the Town manager, testified that the majority of development in the Town is on less than one acre. However, the Town approved the plat for some subdivisions before it adopted one-unit-per-acre zoning. This allowed development at three to four units per acre in thos subdivisions.

[19] The Town Council members did not testify. The mayor testifed that he was personally opposed to the development.

speculation about what development the Town would permit is no evidence of futility. *See id.* The Mayhews were required to bring formal applications before the Town Council.

a. The Effect of the Moratoria and the Luptons' Application

(1) The Moratoria

The Mayhews assert that it was futile to reapply because the Town placed moratoria on planned developments. Other courts have held that where a regulatory body completely bars a landowner from building on his property, reapplication for permits or variances is futile. *See AA. Profiles,* 850 F.2d at 1487 (city not only temporarily and later permanently suspended approval of development project, but also rezoned property, effectively placing "complete moratorium" on development); *Corn v. City of Lauderdale Lakes,* 816 F.2d 1514, 1516 (11th Cir. 1987) (city completely banned development on the property and conceded that even variances were not available to landowner).

The court in *Calibre Spring Hill, Ltd.,* discussed moratoria and futility. In that case, Calibre sought to rezone its property to build an apartment complex. The county denied its rezoning application. Calibre filed suit alleging the county had taken its property without due process and without just compensation. The Georgia federal district court said:

> In *[Corn* andAA. *Profiles],* the Eleventh Circuit held that since *no* development was allowed, [the] plaintiffs' claims were ripe for adjudication. It has not been decided how much development will ultimately be permitted

> on [Calibre's] land. [Calibre] does not assert that [the county] has aimed its zoning decision at halting plaintiff's development, nor is there a *moratorium on development* of [Calibre's] land.
>
> The Boards' denial of [Calibre's] singie request for rezoning does not establish whether [the county] has denied [Calibre] *all* reasonable beneficial use of its property, and, therefore, is not a final reviewable decision under *Williamson.* Therefore, [Calibre's claims] are not npe . .

Calibre Spring Hill, Ltd. v. Cobb County, Ga., 715 F. Supp. 1577, 1580 (N.D. Ga. 1989) (emphasis added).

In this case, the trial court entered the following findings of fact regarding the effect of the moratoria and the Luptons' PD application on futility:

> 101. In denying the application for planned development approval for the Mayhew Ranch Planned Development and the application for planned development approval for the [Luptons'] Planned Development, and in enacting numerous moratoria on applications for consideration of planned development approval, the Town of Sunnyvale has acted pursuant to an official policy not to allow development with a density of greater than one dwelling unit per acre.
>
> 131. The actions of the Town of Sunnyvale reveal a pattern and practice which demonstrates the intent of the Town of Sunnyvale to deny any application for

development approval with a density greater than one dwelling unit per acre.

133. The Town of Sunnyvale has closed the door on future reapplications by Plaintiffs at a realistic or economically viable density.

In point of error nineteen, the Town challenged the legal and factual sufficiency of the evidence to support these findings. We first address point of error nineteen as it concerns the legal sufficiency of the evidence to support these findings. *See Best*, 786 S.W.2d at 671. Regarding the evidence in support of the findings, the record reflects that the Town passed a moratorium on planned developments after the Mayhews filed their PD application. Also, two years after the Mayhews filed suit, the Town denied the Luptons' PD application. This evidence, standing alone, constitutes evidence that the Town would not allow development at more than one unit per acre and indicated that reapplication would be futile. We overrule the Town's point of error to the extent it complains of the legal sufficiency of the evidence to support these findings.

We now review these findings for factual sufficiency and review all the evidence that concerns these findings. *See Burnett*, 610 S.W.2d at 736. The record reflects that the Town passed a moratorium in September 1986, approximately two months after the Mayhews first submitted their application to the Town's planning and zoning committee. This moratorium apparently was in effect until the Spring or Summer of 1987.

After the denial, the Mayhews filed suit against the Town on March 6, 1987. The Town passed a second moratorium on March 9, 1987, three days after the Mayhews filed suit. That moratorium resolution said it was to last approximately four months, until July 1, 1987. No moratorium was in effect between July 1987 and May 1988, when the Town passed another moratorium on planned developments. The May 1988 moratorium lasted approximately six months. In May 1989, the Town passed another moratorium that said the moratorium "shall not exceed a period beyond November 8, 1989." It is not clear how long that moratorium was in effect. The record reflects that each of the moratoria said the Town was undergoing rapid growth and that the Town should manage this growth in an orderly manner. The moratoria resolutions said "necessary studies and committee reports must be made in order to manage and properly plan for such growth."

Chuck Mayhew testified that after the Town denied the Mayhews' PD application, the Town ordered a moratorium on PD applications. He said the moratorium was "in effect when the lawsuit was filed." He said that, after the denial, the Town passed a moratorium prohibiting PD applications. The Mayhews do not dispute the fact that the Town continued to process the Mayhews' PD application despite the fact that it passed a moratorium on planned developments.

Northrup testified that the Town sought to encourage planned developments. Northrup said the Town was "ready for a quality project" and the people of the Town were receptive to a PD application. He testified the people he

talked to at meetings regarding the Mayhews' PD application seemed ready for a quality planned development. He said the Town's mayor pro tem expressed a willingness to modify existing zoning to allow development at a density of greater than one unit per acre.

The Mayhews state in their brief, and the record reflects, that the Town amended its zoning ordinance in 1986. The amendment allowed the Town to grant approval of PD applications with density greater than one unit per acre. Northrup testified that after the Town denied the Mayhews' application, the Town contemplated reconsidering the application.

In considering all of this evidence, we note that, before the Town denied the Mayhews' PD application, the planning and zoning committee said a less intense development than the 3650 to 5025 total units initially proposed would be "preferred." It expressed concern with density, municipal facilities, and environmental problems regarding the Duck Creek plant. In the resolution passing the March 1987 moratorium, the mayor pro tern said the Town needed to conduct studies regarding growth and development. Neither the Town's March moratorium resolution nor the planning and zoning committee's memorandum states that the Town would not allow *any* development. The Town merely denied the Mayhews' single PD application for a minimum of 3600 units. Further, the moratoria did not prohibit applications for variances.

This evidence does not support the trial court's inference that the Town's official policy was to deny development at more than one umt per acre. There were still procedures available to the Mayhews for developing their property when they filed suit, including procedures to obtain variances. *Compare Hoehne,* 870 F.2d at 535 (futile for landowner to seek general plan amendment approval where no variance procedure available and where regulatory body established unwillingness to allow development by rezoning property to further restrict development) *and Herrington II, 857* F.2d at 569-70 (futile for landowner to reapply for development approval where only procedure available was general plan amendment and testimony established that this procedure was not a practical alternative) *with Williamson,* 473 U.S. 188-90 (developer who was denied plat approval for subdivision required to use available variance procedures to

obtain final decision regarding what use, of property will be permitted).

The fact that a moratorium on planned developments was in place did not establish that the Town foreclosed all development. The Town continued to process PD applications. It amended its zoning ordinance in 1986 to allow for planned developments at a density greater than one unit per acre. *See Williamson*, 473 U.S. at 188 (court found claims not ripe because landowner did not seek variance and also noted that committee had recommended granting of variances). This is evidence that the Town did not prohibit all development.

Further, there is evidence that the Mayhews did not consider filing another PD application. It is undisputed that the Mayhews were only interested in a density of 3600 units or more. John Boyd, the Mayhews' real estate broker, testified that Crow, who negotiated with the Mayhews to purchase the property, would not purchase the property unless the Town approved an application with a density of at least 3600 total units. Chuck testified that he told the Town the Mayhews would not accept an approval of anything less than 3600 units. Chuck said he did not speak to any Town officials regarding reapplication after the Town Council voted to deny the Mayhews' PD application. He said he told the Town Council on January 13, 1987 that if the Town did not approve the PD application for 3600 units or more, it would be considered an "outright denial." After the denial by the Town Council, the Mayhews did not amend their PD application and apply for a less dense development or a variance.

This evidence shows the Mayhews did not intend to reapply or seek variances if the Town denied their PD application. Whether a moratorium was in effect makes no difference because the Mayhews did not consider reapplication. The Mayhews' stated position was similar to that of Hamilton Bank in *Williamson*. In that case, the bank said it was futile to seek variances after the zoning commission refused to approve its plat. The bank told the zonlng commission it would not seek variances until the commission approved its plat. It filed suit instead of seeking variances from existing zoning. The United States Supreme Court held the bank was required to seek variances to have a final decision regarding whether its land had been taken. *See Williamson*, 473 U.S. at 187-88.

Likewise, *Corn* and *AA. Profiles*, discussed above, do not stand for the proposition that the passing of any moratorium automatically renders all takings claims ripe. *Corn* and *AA. Profiles* stand for the proposition that, where the regulatory body *prohibits all development*, then further reapplication is futile. *See AA. Profiles*, 850 F.2d at 1487; *Corn*, 816 F.2d at *1516*. The Town did not forbid all development on the Mayhews' property or on the property of other landowners. It continued to process PD applications.

We cannot conclude from the evidence in the record that any moratorium caused reapplication to be futile because (1) the Town considered both the Luptons' and Mayhews' PD applications while a moratorium on planned developments was in effect; (2) the memorandum from the planning and zoning committee did not say it foreclosed all development on the Mayhews' property; (3) the Mayhews could have applied

for variances under other sections of the ordinance; (4) the Town's March 1987 moratorium stated that it was for a short period so the Town could plan for development projects; (5) the Town considered other PD applications after the March moratorium; and (6) the Mayhews said they would not reapply for lesser density. The trial court's inferences about the Town's intent to deny development, based on this evidence, are not supported by factually sufficient evidence.

(2) The Luptons' Application

The Mayhews assert that the Town's denial of the Luptons' PD application shows it was futile to reapply to the Town regarding the use of their land. The record reflects that the Town began reviewing the Luptons' zoning case in December 1987, after the Mayhews had already filed suit. The Town denied the Luptons' PD application more than two years after the Mayhews filed suit.

Futility concerns the reasons why it is useless for an applicant to seek reapplication and allows the property owner to file suit rather than ifie useless applications for development approval. Because the Mayhews had already filed suit when the Town denied the Luptons' PD application, it cannot be said that the Mayhews decided reapplication was futile based on the denial of their neighbors' PD application.

Regarding any later-developing ripeness indicated by the denial of the Luptons' application, the record reflects the following: Dan Sefko, an urban planner testifying for the Town, said the Town asked his firm to review the Luptons'

"zoning case" in December 1987.[20] The Luptons filed their PD application, and the Town considered it after the Town passed the March 1987 moratorium. Sefko said the Luptons' planned development involved more than 1000 acres. It was similar to the Mayhews' proposed development in location, size, and density and was also primarily for residential development. He testified that the Mayhews' and Luptons' applications were similar. The Mayhews' application had a significantly higher quantity of open space. The Luptons' development plan was consistent with the Town's comprehensive plan. He said the density proposed by the Luptons (less than two units per acre) was appropriate for the Town. He did not know whether the Luptons' PD application indicated sewer service would be available. Sefko agreed that a regulatory body may approve a PD application with conditions, such as conditions regarding sewer service. He said he did not study traffic issues regarding the Luptons' application.

Sefko testified that his firm did not serve as the clearinghouse for the Town's analysis of the Luptons' application. His firm did not prepare the report submitted to the Town regarding the Luptons' application, but prepared a portion of it. He said the Luptons' PD application satisfied the section of the ordinance that set forth the types of information required to be in PD applications: article XV. Sefko said he did not consider fiscal impacts in determining appropriate density. He said he generally recommended that the Town approve the Luptons' application.

Robert Ewalt, the Town manager, said the Town voted unanimously to deny the Luptons' application. In the

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[20] The date the Luptons filed their PD application is not reflected in the record.

statement of facts, there is argument from the Town's attorneys regarding why the Town denied the Luptons' application. However, this is not evidence. *See McCain v. NME Hosp., Inc.*, 856 S.W.2d 751, 757 (Tex. App.--Dallas 1993, no writ); *Delgado v. Kitzman*, 793 S.W.2d 332, 333 (Tex. App.--Houston [1st Dist.] 1990, no writ). There is nothing in the record from the Town's planning and zoning committee or Town Council, such as a denial or recommendation memorandum, showing any stated reasons for the denial that this Court can compare with evidence regarding the Luptons' plan. The Luptons' application and related reports are not in the record.

The Town may have denied the application based on specific safety or health concerns that would not pertain to other proposals. *See Southern Pac.*, 922 F.2d at 504 & n.7 (in deciding futility, court considered evidence that regulatory body denied another applicant variance, but rejected this as evidence of futility because denial was "based on specific safety and aesthetic concerns which would not pertain to other proposals.") The Mayhews had the burden to prove futility. *See Samaad*, 940 F.2d at 934. The fact that the Town denied the Luptons' application for an unspecified reason does not establish that the Town acted to deny all development at more than one unit per acre.

We are aware that, in reviewing factual sufficiency points, we are not to substitute our judgment for that of the trial court regarding the credibility of the witnesses. *See Aerospatiale Helicopter Corp. v. Universal Health Serv.*, 778 S.W.2d 492, 498 (Tex. App.--Dallas 1989, writ denied), *cert. denied*, 498 U.S. 854 (1990). Questions of intent and mental states are normally questions of fact left to the trier of fact who had the opportunity to judge the credibility of the witnesses. *See Logan v. Mullis*, 686 S.W.2d 605, 608 (Tex.

1985). However, in drawing inferences about the Town's intent to deny all development from the facts in the record, the trial court did not judge the credibility of the witnesses from the Town. The trial court did not weigh the "credibility" of the Town as a witness because the Town could not testify. The council members did not testify.[21] The trial court was called upon, not to weigh the "credibility" of the Town as a witness, but to make inferences regarding futility based on the facts before it.

We must weigh the reasonableness of the inferences that could be drawn by the trial court in light of all facts and circumstances. *See Texas & N.OR. v. Burden*, 146 Tex. 109, 123, 203 S.W.2d 522, 531 (1947). Considering all the evidence in the record, and based on the objective evidence before the trial court regarding futility, we hold that an inference or conclusion that the Town intended to deny all development is incorrect. The manner in which the Town rejected the Mayhews' application did not make it clear that the Town would refuse all projects. *See Southern Pac.*, 922 F.2d at 504. Based on the facts of this case, we hold that this evidence does not support the finding that the Town prohibited all development at more than one unit per acre. Because variance procedures were available, we hold the Mayhews were required to utilize them. *See Williamson*, 473 U.S. at 186. We sustain the Town's point of error to the extent it complains of the factual sufficiency of the evidence to support findings of fact numbers 101, 131, and 133.

c. Range of Densities

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[21] Because the Town Council acts as a governing body, evidence concerning statements of individual members regarding how they may vote when deciding whether the Town will approve any applications for development or variances is not relevant. *See Madero*, 803 S.W.2d at 401.

The Mayhews next contend that reapplication was futile and the Town would not permit development of the Mayhews' property because the Town had already considered and rejected a "range" of development possibilities. Apparently, this assertion refers to the Town's consideration of a range of densities. In its findings and conclusions, the trial court found as follows:

Findings of Fact

> 130. The Town of Sunnyvale considered and rejected countless alternative densities during the consideration of the application for Planned Development Approval for Mayhew Ranch Planned Development and permutations to the density originally proposed by plaintiffs.

Conclusions of Law

> 189. When the Town Council considered the application for planned development approval for the Mayhew Ranch Planned Development, the Town Council had the authority to and did consider and reject each and every level of density between one [1] and four and two-tenths [4 2/10] dwelling units per acre.

In point of error nineteen, the Town challenged the legal and factual sufficiency of the evidence to support this finding. It also challenged the correctness of the conclusion of law number 189. We first review the Town's legal sufficiency point. In reviewing the evidence in support of this finding, we note that Chuck testified that the Town considered a range of

densities. This is evidence in support of the finding that the Town considered a range of densities. We overrule this point of error to the extent it applies to the legal sufficiency of the evidence to support this finding. We now review for factual sufficiency this finding that the Town considered and rejected levels of density less than the 3600 units formally requested in the Mayhews' PD application.

Northrup testified that the Mayhews filed only one PD application. Chuck testified several times that the Mayhews submitted only one PD application and that the minimum number of units proposed was 3600. He said he did not "reconfigure" the application after the denial. He said the Mayhews told the Town they would not accept anything below 3600 units. In their PD application, the Mayhews did not request approval for less dense development. A review of all the evidence shows the Town considered only one PD application for the Mayhews, and that the proposed density was for a minimum of 3600 units. *See Burnett,* 610 S.W.2d at 736. We hold the evidence is factually insufficient to support the trial court's finding that the Town considered a range of densities.

The Mayhews contend that article XV, section five of the Town's zoning ordinance authorizes the imposition of conditions on planned development approvals, including limits on the number of permitted units. They assert that article XV required the Town to approve their PD application and then propose conditions or changes to the plan. The trial court entered a finding of "fact" and also a conclusion of law that the Town Council had the authority to approve the Mayhews' application with conditions, including a condition of lower

density. This "finding of fact" is actually a conclusion of law because it addresses the Town's power or authority. Accordingly, we address this as a conclusion of law rather than as a finding of fact. On appeal, the Town challenged both this finding and conclusion of law number 189.

Section 5 of article XV of the ordinance is as follows:

> Deviation from the regulations established in this ordinance applicable to particular uses may be permitted when the developer demonstrates that adequate provisions have been made in the planned development to protect contiguous land uses, that pedestrian and vehicular traffic . . . systems are safe, . . . that the development will progress in orderly phases, and that the public . . . welfare will be protected. For the PD district, use regulations applicable to a particular use shall be the same as if such use were situated in a district in which such uses are otherwise permitted in this ordinance, unless other restrictions and regulations are approved as a part of the development site plan and the PD district ordinance amendment.

Contrary to the Mayhews' contention, this section does not require the Town to approve a PD application at densities of less than those proposed. Chapter 16 of Mixon, TEXAS MUNICIPAL ZONING LAW, cited by the Mayhews, also does not cite Texas law requiring the Town to approve PD applications with conditions rather than deny the applications. MIXON, TEXAS MUNICIPAL ZONING LAW, ch. 16 (2d

ed. 1993). We will not presume the Town acted upon any applications or variations of applications other than those actually presented to it for approval. In *MacDonald* and *Williamson*, the Court required landowners to reapply upon denial and did not assume the regulatory body could have or should have accepted the application with modifications. *See, e.g., McDonald*, 477 U.S. at 348; *Williamson*, 437 U.S. at 186. The evidence at trial showed the Mayhews did not ask for approval of a modified application.

d. Availability of Variance Procedures

The Mayhews contend that they did not have to apply for variances because, "according to the Town's own attorney," no procedure for obtaining variances existed. It is futile to apply for a variance if it is not a legally viable option. *See Hoehne*, 870 F.2d at 535. The Mayhews attached to their brief in this appeal a page from a brief purportedly filed by the Town in the United States Supreme Court in an earlier appeal related to this case. We will not consider this evidence because it is outside the record.[22] *See Carlisle v. Phillip Morris, Inc.*, 805 S.W.2d 498, 501 (Tex. App.--Austin 1991, writ denied); *Perry v. Kroger Food Store No. 119*, 741 S.W.2d 533, 534 (Tex. App.--Dallas 1987, no writ) (attachment of documents to brief is not formal inclusion in record).

We now look to the Town's zoning ordinance then in effect to see whether procedures were available to the

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[22] The brief was not intorduced at trial.

Mayhews to apply for a variance[23] or special-use permit. Article XVII of the Town's zoning ordinance then in effect, in pertinent part, is as follows:

> The City Council of the City may, after public hearing and proper notice to all parties affected, and after recommendations from the Planning and Zoning Commission containing such requirements and safeguards as are necessary to protect adjoining property, authorize by ordinance the location of any of the following specified districts:
>
> * * *
>
> *Every special use permit granted under the provisions of this article shall be considered as an amendment to the zoning ordinances as applicable to such property.* In granting such permit the City Council may impose conditions which shall be complied with by the grantee before certificate of occupancy may be issued
>
> ...

(Emphasis added.) Article XX of the same ordinance, in relevant part, is as follows:

> *The Board is hereby vested with power and authority, in appropriate cases and subject to appropriate conditions and safeguards to make such exceptions to the terms of this*

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[23] As discussed, *supra*, the ordinance also permitted variances in the form of PD applications.

> *ordinance in harmony with its general purpose and intent* and in accordance with general or special rules therein contained for the purpose of rendering full justice and equity to the general public.
>
> * * *
>
> The Board of Adjustment shall have the following powers:
> To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this ordinance. To hear and decide special exceptions to the terms upon which the Board is required to pass under this ordinance, to authorize upon appeal in special cases, such variances from the terms of the ordinance as will not be contrary to the public interest....

(Emphasis added.) A review of the Town's ordinance shows the Town could consider applications for variances and special-use permits. Therefore, the record shows that obtaining a variance is a legally viable option. See Herrington II, 857 F.2d at 569-70.

The Mayhews contend that forcing them to apply for a variance would be a "gross usurpation of legislative authority" by the Town.[24] It is true that courts do not require

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[24] Chuck testified that the Town might refuse to issue building permits or delay approval based on issues regarding sewer service. The Mayhews contended at trial that the Town did not have a valid concern regarding the availability of sewer service and that this was a contrived reason

a property owner to resort to piecemeal litigation or otherwise unfair procedures to obtain a determination regarding land use. See MacDonald, 477 U.S. at 351 n.7. However, even subdivision developers have been required to seek variances to meet ripeness requirements. See Williamson, 473 U.S. at 189.

The record reflects that planned developments are "phased" or built in increments over several years. Joseph Pobiner, the Town's former planner, testified for the Mayhews. He said it is possible to file PD applications in smaller increments of 50 to 100 acres. He said there is no impediment to development in smaller increments. The Mayhews could have applied for alternative development at greater densities than one unit per acre by seeking variances for portions of their property they wished to develop. The best support for a claim of futility is completion of the steps mandated by *Williamson* and *MacDonald:* the unsuccessful pursuit of either a variance or a proposal for less intense development. *See Williamson,* 473 U.S. at 192; *MacDonald,* 477 U.S. at 35 1-52.

e. Compliance with Article XV

The Mayhews contend that any reapplication would have been futile because their PD application already complied in every respect with article XV of the Town's zoning ordinance. Article XV concerned planned developments. The record reflects that, in response to

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for the denial. Chuck also complained that building permits are expensive. However, speculation regarding whether the Town may deny buidling permits is not evidence of futility.

requests for admissions, the Town admitted article XV contained all the substantive standards for approval of PD applications.

Article XV set forth the information that an applicant must include in a PD application. For instance, this section of the ordinance encouraged applicants to submit a tentative land-use sketch and to "obtain information on any projected plans, programs, or other matters that may affect the proposed development." The types of information applicants were to provide to the planning and zoning committee in the application included, *inter alia*, information on (1) "the proper relationship between the proposed development and surrounding uses,"(2) "adequacy of existing proposed streets . . . and other public facilities," and (3) "the adequacy of the land area and of the surrounding areas to accommodate future expansion."

Article XV did not set forth specific "approvable" characteristics. In other words, an applicant could meet the requirements of article XV merely by including certain required information in a PD application. Evidence that the Mayhews' PD application "met all of the requirements" of article XV did not entitle the Mayhews to automatic approval of their PD application.

The Mayhews apparently assert that, because they submitted a plan that met all the requirements of article XV, any revised plan would not be any more acceptable to the Town. Article XV did set forth all the requirements for a PD application, and set forth all of the types of information the Town would consider. However, it is clear from reading article XV that fulfilling its requirements does not guarantee automatic approval of a PD application. We hold that, under the facts of this case, the trial court incorrectly concluded in

conclusions of law numbers 187, 188, and 190 that further reapplication by the Mayhews was futile and that the Mayhews' claims were ripe.

3. Sununary and Conclusion

Based on the evidence in this case, we conclude that the Mayhews have not established futility and further conclude that their claims are not ripe. Reviewing the record as a whole, we cannot say that the Mayhews met their burden to prove by sufficient evidence that it was futile to reapply for development. We limit our holding to the facts of this case, and particularly to the facts stated in this opinion regarding futility.

We further point out that the summary judgment evidence not introduced into evidence at trial on remand is not before this Court with regard to its sufficiency review in this appeal. *See Harris County,* 841 S.W.2d at 558; *May v. May,* 829 S.W.2d 373, 376 (Tex. App.--Corpus Christi 1992, writ denied) (op. on reh'g); *Johnson by Johnson v. Li,* 762 S.W.2d 307, 308 (Tex. App.--Fort Worth 1988, writ denied). The "facts" stated by this Court in its prior opinion were, of course, under the summary judgment standard of review, taken as true and viewed in the light most favorable to the Mayhews. The parties did not introduce at trial much of the evidence that apparently was before the trial court during the summary judgment hearing. We did not rely on the "facts" as stated in our prior opinion in rendering this opinion, nor did we consider summary judgment evidence from the record that the trial court did not admit into evidence. *See Sawyer v. Donley County Hosp. Dist.,* 513 S.W.2d 106, 110 (Tex. Civ. App.--Amarillo 1974, no writ) (appellate courts will not consider proof outside record regarding trial court's jurisdiction). We sustain the Town's first four points of error.

We also sustain the Town's nineteenth point of error as it concerns the findings of fact discussed herein. Consequently, we dismiss the Mayhews' claims.

In its sixteenth point of error, the Town contends the trial court erred in granting the Mayhews' application for an injunction. Because we dismiss the causes of action on which the trial court based the injunction, we sustain this point of error and reverse that part of the trial court's judgment granting an injunction as a remedy.

In its seventeenth point of error, the Town contends that the trial court erred in awarding attorneys' fees to the Mayhews. Because we dismiss the causes of action on whichthe trial court based its award of attorneys' fees, we sustain this point of error and reverse that part of the trial court's judgment awarding attorneys' fees. Because of our disposition of this case regarding the Mayhews' claims, we need not address the Town's other points of error.

We order the Mayhews' claims dismissed and the injunction dissolved.

/s/ John Ovard Justice

Appendix F

Reversed and Rendered and Opinion Filed February 16, 1995

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-92-01401-CV

THE TOWN OF SUNNYVALE, Appellant

V.

CHARLES MAYHEW, SR., CHARLES MAYHEW, JR., THE ESTATE OF AUDREY MAYHEW, AND SUNNYVALE PROPERTIES, LTD., Appellees

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On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. 87-3074-K

SUPPLEMENTAL OPINION ON MOTION FOR REHEARING

Before Chief Justice Thomas and Justices Ovard and Morris

Opinion By Justice Ovard

In our initial opinion of May 10, 1994, we addressed the issue of ripeness. Since that date, the Texas Supreme Court issued *Taub v. City of Deer Park*, 882 S.W.2d 824 (1994), *cert. denied*, 115 5. Ct. 904 (1995). In this supplemental opinion on motion for rehearing, we apply the law from *Taub* and address the Towns points of error regarding the merits of the Mayhews takings, equal protection, and due process claims.

A. Takings

In its eighth point of error, the Town contends that the trial court erred in concluding that the Town deprived the Mayhews of their properties economically viable use when it applied the Town's zoning ordinance to the property. The Town asserts that the Fifth Amendment temporary or permanent taking of the Mayhews property. In its nineteenth point of error, the Town contends there was no evidence or insufficient evidence to support the trial courts findings of fact.

1. Applicable Law and Standard of Review

The Fifth Amendment to the United States Constitution provides that the government shall not take private property for public use without just compensation. U.S. CONST. amend. V. The provision applies to the states under the Fourteenth Amendments Due Process Clause. *Estate of Scott v. Victoria County*, 778 S.W.2d 585, 589 (Tex. App.--- Corpus Christi 1989, no writ). Article one, section seventeen of the Texas Constitution provides that "[n]o persons property shall be taken, damaged or destroyed for or applied to public use without adequate compensation

being made, unless by the consent of such person." TEX. CONST. art. I, § 17. Inverse condemnation occurs when the government violates article one, section seventeen by wrongfully taking property without paying just compensation to the owner. To recover under a theory of inverse condemnation, the property owner must establish that the governmental entity intentionally performed certain acts which resulted in a taking of his property for public use. Woodson Lumber Co. v. City of College Station, 752 S.W.2d 744, 746 (Tex. App.--Houston [1st Dist.] 1988, no writ).

A "taking" can be either a physical appropriation of the property or an unreasonable interference with the landowners right to use and enjoy his property. See State v. Biggar, 873 S.W.2d 11, 13 (Tex. 1994); DuPuy v. City of Waco, 396 S.W.2d 103, 108 (Tex. 1965); Allen v. City of Texas City, 775 S.W.2d 863, 865 (Tex. App.--Houston [1st Dist.] 1989, writ denied). Governmental restrictions on the use of property can be so burdensome that they result in a compensable taking. San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266, 273 (Tex. Civ. App.--San Antonio 1975, writ ref'd n.r.e.).

However, all landowners hold property subject to the valid exercise of police power. A municipality is not required to compensate a landowner for losses occasioned by the proper and reasonable exercise of police power. See City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 805 (Tex. 1984). To constitute a valid exercise of police power rather than a taking, a municipal ordinance must be: (1) adopted to accomplish a legitimate goal substantially related to the public health, safety, and general welfare; and (2) reasonable rather than arbitrary. See Turtle Rock, 680 S.W.2d at 805. Land-use regulations do not effect a taking if they substantially advance a legitimate state interest. See Nollan v.

California Coastal Comm'n, 483 U.S. 825, 834 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). A concern about a stench or foul smell is a valid and legitimate concern regarding a municipalities exercise of police power. See generally Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (concern about stench is related to the public health, safety, and general welfare).

Courts also consider the following factors to determine whether a taking has occurred:

(1) whether the ordinance rendered the property wholly useless, (2) whether the governmental burden disproportionately diminished or destroyed the properties economic value, and (3) whether the governments action against the owners economic interest was for its own advantage. See City of Austin v. Teague, 570 S.W.2d 389, 393 (Tex. 1978). The law presumes that an ordinance is reasonable and valid. Whether a particular ordinance is a proper exercise of police power or constitutes a compensable taking is a question of law for the court. The mere fact that an ordinance may prevent the most profitable use of property does not conclusively establish that there has been a taking. See Jackson Court Condominiums, Inc. v. City of New Orleans, 874 F.2d 1070, 1080 (5th Cir. 1989); Taub, 882 S.W.2d at 826; Estate of Scott, 778 S.W.2d at 590.

We have previously stated the standard of review for reviewing the trial courts findings of fact and conclusions of law.

2. Applicable Facts

Various witnesses testified about the Mayhews planned developments economic feasibility. Lane Kendig, a city-planning consultant, testified that the density of a

development relates to the developments economic feasibility. He said the Town's zoning ordinance did not allow for economically feasible development of apartments and other types of residential development because the densities allowed by the ordinance were too low. He said it was unreasonable to expect anyone to use the Towns zoning categories.

David Bagwell, a land developer for the Trammell Crow Company (Crow), testified that, in his opinion, it is not economically feasible to develop single-family residences at a density of either one or two units per acre. John Boyd, a real estate broker, testified that he was familiar with the Mayhews property and PD application. He stated that, in his opinion, 3600 units was the lowest cost-effective density. He said a planned development with 3600 units would be "pushing it" so that the developer would have to be careful about costs. He testified that Crow sought to develop the Mayhews planned development with "fancy" amenities and "beautiful corridors. He testified that Crow could not profitably develop the property and would not purchase it unless the Town approved the zoning change. He said a standard, generic development usually involved four units per acre. Boyd said he never calculated whether the Mayhews planned development would be profitable.

Teresa Butler, a market research consultant, testified that the housing market would absorb homes built on one-acre lots more slowly because they are more expensive. She testified that the housing market could absorb only eight single-family homes per year in Sunnyvale if one-acre zoning remained in place. She said that it would not be economically viable for a developer to build homes at a density of less than three dwelling units per acre. She admitted that, at her deposition, she testified that the Mayhews planned development would have been viable from a

market-absorption standpoint with an overall density of two units per acre.

Daniel Guimond, the economic consultant testifying for the Mayhews, said that some level of development on the Mayhews[2] Other developers besides Crow had negotiated with the Mayhews regarding development of the property. Michael Smiley, a land planner, testified that the Mayhews intended to make their planned development to resemble Highland Park, Texas, with high levels of quality and abundant landscaping. He said Highland Park is an upper income area.

Several witnesses testified that investors assume the Town will deny all development applications. They said the Towns denial of the Mayhews PD application indicates the Town will not approve any development. Charles Mayhew, Sr. testified that it was not profitable for the Mayhews to use their land for agricultural use. Chip Northrup's testimony about the Mayhews property is set forth in our May 10, 1994 opinion. Chuck Mayhew's testimony, including his testimony about the market for the Mayhews property, regarding whether the Mayhews attempted to sell the property, and other uses for the property, is set forth in our initial opinion.

The Mayhews asserted, and the trial court found, that adequate sewer facilities were available for the Mayhews planned development because the Duck Creek sewage treatment plant would provide sewer service. Robert Ewalt, the Towns manager, testified that, at the time the Town denied the Mayhews PD application, foul odors existed in the Town. Ewalt testified that the odors were thought to be emanating from the Duck Creek plant.

William Dollar, an assistant city manager for the City of Garland, testified that people complained to the City of Garland that odors were emanating from the Duck Creek plant. He said the City of Garland investigated their source. He said he told officials from the Town that the odors were not coming from the plant. In 1987 or 1988, after the Town denied the PD application, the City of Garland determined that the odors were coming from lake sediment. Dollar showed these findings to some officials. He testified that the City of Garland knew the plant was not the source of the odors, but it had no logical explanation for the odors until it discovered the actual source of the odors.

Joseph Pobiner, a former planner for the Town who testified for the Mayhews, stated that he understood the Duck Creek plant had a history of failures and violations. He said he was concerned with this, but he satisfied himself that the plant could handle the added sewage from the Mayhews planned development. He testified that he satisfied himself that there were no operational problems with the Duck Creek plant. He said the concern about the Duck Creek plants history of violations and breakdowns was a reasonable concern regarding an addition to the plant. He stated that the concern about the plant was not a reasonable basis to deny the Mayhews PD application.

In their preliminary recommendations, the Towns Planning and Zoning Commission recommended that the Town deny the Mayhews PD application. The recommendation said that the commission believed the planned development would severely impact the Towns ability to provide adequate municipal services. It said, "The Duck Creek Treatment Plant already creates an environmental hazard." The recommendation set forth other concerns and said, "The surrounding areas would be impacted without a

balancing contribution to the health, welfare, morals and well being of the community...."

The trial court found that: (1) the Town singled out the Mayhews to bear the costs of "public preferences," (2) the Town intended to prevent all development on the Mayhews property, (3) the Town destroyed the value of the Mayhews property, (4) the Mayhews proposed planned development was the properties only economically viable use, and (5) because of the Towns actions pursuant to its ordinance, there is no economically viable use for the Mayhews property. The trial court concluded that: (1) the Mayhews property has no economically viable use, (2) the Town imposed a servitude on the property for the public's benefit, (3) the denial of the PD application did not advance a legitimate state interest, (4) the Town took the Mayhews property for public use, (5) the Towns actions pursuant to its ordinance destroyed the value of the Mayhews property, and (6) the Town took the Mayhews property without just compensation.

3. Application of the Law to the Facts

Even if we assumed that the Mayhews takings claim was ripe, the Mayhews have not established a taking. The Mayhews had the burden at trial to establish that the Town took their property. See City of Pharr v. Pena, 853 S.W.2d 56, 60 (Tex. App.--Corpus Christi 1993, writ denied). We will consider all the evidence in the record, including the evidence set forth above and in our May 10. 1994 opinion.

Chuck Mayhew testified that the Town deprived the Mayhews of their properties economically viable use. This testimony provides some evidence that the Town intended to deny all development, deprive the Mayhews of their properties economically viable use, and destroy the properties

value. We overrule the Towns eighth and nineteenth points of error to the extent they attack the legal sufficiency of the evidence to support the trial courts findings that the Town intended to prevent all development, deny all economically viable use of the Mayhews land, and destroy the properties value without a reasonable basis.

We now address the Towns eighth and nineteenth points of error to the extent they attack the factual sufficiency of the evidence to support these findings. The evidence does not show the Mayhews lost all economically viable use of their property. The Town said it was conducting studies regarding development. It amended its zoning ordinance to permit planned development. These facts show that the Town did not intend to deny all development on the Mayhews property. The Town denied the Mayhews only a single application for one development proposal. The Mayhews did not apply for any other use. Thus, the Mayhews failed to show the ordinances application rendered their property wholly useless. See Teague, 570 S.W.2d at 393.

The Mayhews did not show the governmental burden disproportionately diminished or destroyed the properties economic value. Id. The Mayhews asserted that the deprivation of an economically viable use diminished the expectation-based value of their land. This deprivation does not constitute a taking. See Pace, 808 F.2d at 1031; Taub, 882 S.W.2d at 826. The fact that the Town denied the Mayhews their PD application for a 1200-acre planned development does not mean the Town denied the Mayhews all economically viable use of their property. See MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 353 n.9 (1986). As the Supreme Court indicated in MacDonald, the rejection of exceedingly grandiose development plans does

not logically imply that less ambitious plans will receive similarly unfavorable reviews. *Id.*

The Mayhews also did not show that the Town intended to take their property for its own advantage. See Teague, 570 S.W.2d at 393. Like the plaintiff in City of Pharr v. Pena, the Mayhews have not shown the Town had an improper motive to deny all development. See Pena, 853 S.W.2d at 61. The Mayhews maintained the Town took their property for public use and imposed a "scenic easement" on the property. They also asserted the Town sought to keep their property as an open space in order to preserve the Towns rural atmosphere. To preserve a scenic easement, the Town would have to deny all use. The Towns action regarding development studies and zoning ordinance amendments demonstrates it did not intend to deny all development on the Mayhews property. The Mayhews failed to show the Towns action against their economic interest was for the Towns own advantage. *See Taub*, 882 S.W.2d at 827; *Teague*, 570 S.W.2d at 393.

The Mayhews complained that the Town encouraged them to apply for zoning approval and that they spent over $500,000 in the application process. However, purchasing and developing real estate carries with it certain financial risks The Town did not have a duty to underwrite this risk as an extension of its obligations under the takings clause. *See Taub*, 882 S.W.2d at 826. The takings clause does not charge the government with guaranteeing the profitability of the Mayhews property. See id. Under these circumstances and facts, the Towns refusal to rezone the Mayhews property places no constitutional burden on their property. *See Taub*, 882 S.W.2d at 826.

We note that, in this case, the Town changed its zoning ordinance to permit planned developments. In moratoria, the Town stated it would conduct studies regarding further development. When the Town denied the Mayhews PD application, it did not deny all development. These facts demonstrate the Town did not take the Mayhews property. *See Schafer v. City of New Orleans,* 743 F.2d 1086, 1090 (5th Cir. 1984).

Based on a review of all the evidence, we hold that the trial courts inferences from the facts and resulting findings that the Town intended to prevent all development, deny all economically viable use of the Mayhews land, and destroy the property[3] *See Taub,* 882 S.W.2d at 826; *Teague,* 570 S.W.2d at 394-95. We sustain the Towns eighth and nineteenth points of error to the extent the Town complained of the factual sufficiency of the evidence to support the trial courts findings of fact 99, 100, 103, 104, 105, 120, and 121. We also sustain the Towns eighth and twelfth points of error to the extent the Town complained of the trial courts conclusions 165, 166, 167, 169, 170, 171, and 172.

B. Substantive Due Process

In its ninth point of error, the Town contends the trial court erred in concluding that the Towns zoning regulations or its actions pursuant to its zoning ordinance deprived the Mayhews of substantive due process or did not substantially advance legitimate governmental interests. In its nineteenth point of error, the Town contends there is no evidence or insufficient evidence to support the trial courts findings.

1. Applicable Law and Standard of Review

Substantive due process requires a municipalities zoning ordinance to he rationally related to a legitimate state purpose. See Aladdins Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1039 (5th Cir. 1980), rev'd in part on other grounds, 455 U.S. 283 (1982). A municipality may not arbitrarily infringe upon protected property rights and arbitrarily limit land use. See Spring Branch I.S.D. v. Stamos, 695 S.W.2d 556, 561 (Tex. 1985) (citing Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (1921), appeal dismissed, 475 U.S. 1001 (1986). Instead, municipalities must base their actions on reason. They must not arbitrarily exercise police power. Ordinances must bear a substantial relation to public health, safety, and welfare. See Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928); Turtle Rock, 680 S.W.2d at 805.

The concept of "public welfare" has a broad range. Turtle Rock, 680 S.W.2d at 805. It represents values that are spiritual as well as physical, and aesthetic as well as monetary. A municipalities legitimate concern is to ensure that the community is beautiful as well as healthy, spacious as well as clean, and well balanced as well as carefully patrolled. *See Berman v. Parker,* 348 U.S. 26, 33 (1954). The courts presume municipal exercises of police power are valid with regard to their substantive integrity. *See, e.g., Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395-96 (1926). The courts may not interfere unless the ordinance is unreasonable, arbitrary, and a clear abuse of municipal discretion. *See Hunt v. City of San Antonio,* 462 S.W.2d 536, 539 (Tex. 1971).

2. Applicable Facts

The Mayhews base their substantive due process claim on their allegations that: (1) the Town did not base its denial

of the PD application on any criteria set forth in the zoning ordinance and, for that reason, the denial was arbitrary and capricious, and (2) the application of one-acre zoning deprived the Mayhews of substantive due process because the zoning ordinance does not accomplish a legitimate public purpose. The trial court entered findings of fact and conclusions of law. The trial court found that: (1) the Mayhews planned development would not have an adverse effect on the public health, safety and welfare, (2) there was no legitimate sewer problem, (3) one-acre zoning did not bear a relationship to the public health, safety and welfare, and (4) the Towns zoning ordinance was not rational or related to the public health, safety and welfare. The trial court concluded that: (1) sewer service was accessible, (2) there was no factual basis to deny the PD application and the denial was arbitrary and unrelated to the public health, safety and welfare, (3) one-acre zoning was not related to the public health, safety and welfare or any other public purpose and no rational person could have found it was so related, and (4) the Town violated the Mayhews substantive due process rights when it denied the Mayhews PD application and applied one-acre zoning.

3. Application of the Law to the Facts

To review the trial courts findings regarding the Mayhews substantive due process claims, we must review the evidence about whether the Towns ordinance and its application of the ordinance rationally related to a legitimate state purpose. *See Aladdins Castle*, 630 F.2d at 1039. We must address whether the evidence shows the Town acted arbitrarily rather than with a legitimate state purpose when it denied the Mayhews PD application. We will first address the Towns no evidence point of error regarding (1) whether the Town had a rational basis for denying the Mayhews PD

application, and (2) whether the Town could have rationally believed there was a problem with sewer service and the Duck Creek plant.

The record reflects that Joseph Pobiner said it was not reasonable for the Town to deny the Mayhews PD application based on concerns about adequate sewer service. This testimony provides some evidence supporting the trial courts findings that the Towns denial of the PD application was not rationally related to a legitimate state purpose. We overrule the Towns nineteenth point of error to the extent that the Town contends that no evidence supports the trial courts findings 37, 53, 76, 77, 93, 94, and 98. We now address the Towns nineteenth point of error to the extent it challenges the factual sufficiency of the evidence to support the trial courts findings.

The record shows that the Towns zoning ordinance and denial of the Mayhews PD application were substantially related to the public health, safety, and general welfare. The evidence set forth under point of error eight shows that the Duck Creek plant had experienced problems with violations and breakdowns. Recently, the plant had been operating under the Environmental Protection Agencyÿs supervision. The Towns citizens were concerned about a stench that people thought the Duck Creek plant produced. The Town had a legitimate state interest in controlling the stench that reasonably could be perceived to be caused by the Duck Creek plant. Reasonable minds could have differed regarding whether the denial of a large development project that would further tax the plant is a rational and reasonable means of accomplishing that purpose. Based on this evidence, we determine that this concern substantially relates to the public health, safety, and general welfare. *See Village of Belle Terre*, 416 U.S. at 9.

The trial court inferred from the facts and found that the Town could not have rationally believed there was a problem with sewer service and the Duck Creek plant. It also found that the Towns denial of the PD application and application of one-acre zoning bore no substantial relation to the public health, safety, and welfare. Based on all of the evidence in the record, specifically that set forth above and in our initial opinion, we hold that the trial courts inferences from the facts and resulting findings in this regard are against the great weight and preponderance of the evidence. A review of all the evidence shows that reasonable minds could differ regarding (1) whether the Towns reason for denying the Mayhews PD application was rationally related to the public health, safety, and welfare and (2) whether the Town abused its discretion in denying the PD application and continuing to apply one-acre zoning to the property. *See Turtle Rock*, 680 S.W.2d at 805. Reasonable minds could differ about whether the Town could have reasonably believed it should delay development to further study municipal planning and the availability of municipal services. See Shelton v. City of College Station, 780 F.2d 475, 479 (5th Cir.), cert. denied, 477 U.S. 905, and cert. denied, 479 U.S. 822 (1986); Turtle Rock, 680 S.W.2d at 805; State v. Richards, 157 Tex. 166, 301 S.W.2d 597, 602 (1957). Because of prior difficulties with the Duck Creek plant, reasonable minds could differ about whether this delay was related to the public health, safety and welfare. See Shelton, 780 F.2d at 479; Turtle Rock, 680 S.W.2d at 805. We sustain the Towns nineteenth point of error to the extent the Town complains about the factual sufficiency of the evidence to support findings 37, 53, 76, 77, 93, 94, and 98.

Further, we have already held that the Town did not deprive the Mayhews of a constitutionally-protected property interest. Therefore, because the Mayhews have not shown an

arbitrary infringement of a property right, they have not established a substantive due process violation under either the Texas or federal constitutions. See Stamos, 695 S.W.2d at 561. The trial courts conclusions that the application of the Towns zoning ordinance and the denial of the Mayhews PD application denied the Mayhews substantive due process are incorrect. We sustain the Towns ninth point of error.

C. Equal Protection

In its fifth point of error, the Town contends the trial court erred in concluding that the Towns denial of the Mayhews PD application violated their equal protection rights. In its tenth point of error, the Town asserts that the trial court erred in concluding that the Towns zoning regulations and its actions pursuant thereto violated the Mayhews equal protection rights because: (1) the Mayhews are not members of a suspect class, (2) the denial was rationally related to the legitimate state interest of assuring adequate public facilities, and (3) no evidence shows that the Town treated the Mayhews differently from other similarly-situated property owners.

1. Applicable Law and Standard of Review

To assert an as-applied equal protection claim, a plaintiff must allege the defendant treated the plaintiff differently from other similarly-situated landowners without any reasonable basis. Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1541 (11th Cir.), cert. denied, 502 U.S. 810 (1991). In response to an equal protection challenge, courts presume an ordinance is valid and will sustain it if the statutory classification rationally relates to a legitimate state interest. See HL Farm Corp. v. Self, 877 S.W.2d 288, 290 (Tex. 1994). Under the federal standard, if any state of facts

justifies the ordinance, the court should uphold the ordinance. See Sullivan v. Stroop, 496 U.S. 478, 485 (1990). If an ordinance infringes upon fundamental rights or burdens an inherently suspect class, courts will subject it to "strict" or heightened scrutiny. See Stamos, 695 S.W.2d at 560. If an ordinance is not subject to heightened scrutiny, courts should review the zoning ordinances application to decide whether it rationally relates to its intended purpose. See Sullivan v. University Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981).

2. Applicable Facts

In their pleadings, the Mayhews alleged that the Town arbitrarily and capriciously denied their PD application and did not base the denial on factors related to the public health, safety, and welfare.[4] The trial court made the following conclusions of law:

162. The application of the Town of Sunnyvale's one-acre zoning to Plaintiffs property does not serve and does not have a rational relationship to a legitimate public purpose and denies Plaintiffs equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States and article I, section 8 of the Constitution of the State of Texas.

163. No rational person could conclude, and reasonable persons could not differ, that the classifications in the Zoning Ordinance of the Town of Sunnyvale are rationally related to a legitimate public purpose.

3. Application of the Law to the Facts

On appeal, the Town contends it did not deny equal protection to the Mayhews because no evidence shows the Town treated similarly-situated landowners differently. The Town contends the denial of the Mayhews PD application was rationally related to a legitimate purpose and did not violate the Mayhews fundamental rights. The Mayhews asserted in their brief that the evidence supports the trial courts findings because (1) the Town allowed other landowners to build on lots of less than one acre while the Mayhews could not, and (2) the one-acre requirement and other ordinance classifications did not make sense.

We must review the challenged conclusions of law for correctness. See Mercer, 715 S.W.2d at 697. Initially, we must determine whether strict scrutiny applies. See Stamos, 695

The Mayhews did not go forward with allegations that the Town had a racially motivated intent when it applied one-acre zoning to the Mayhews property.

S.W.2d at 560. The Mayhews do not have a fundamental right to have their property rezoned to permit a 1200-acre planned development. See generally Taub, 882 S.W.2d.

The Mayhews are not members of a suspect class. See Stamos, 695 S.W.2d at 559. Therefore, strict scrutiny does not apply, and we must determine whether the application of one-acre zoning and the denial of the PD application was rationally related to a legitimate state interest. See Stamos, 695 S.W.2d at 560.

We have already held that the Towns denial of the Mayhews PD application and application of the zoning

ordinance to the Mayhews property served a legitimate state interest. Therefore, the Mayhews equal protection claim must fail on that ground. Further, nothing in the record shows the Town treated the Mayhews differently from other similarly-situated landowners. The record reflects that the Town granted variances to some landowners who developed on lots of less than one acre. However, a landowner seeking a zoning change for a 1200-acre development is not "similarly situated" to a landowner seeking to build on a small parcel of land. No evidence shows that the Town denied the Mayhews a planned development while granting other landowners PD applications. The Mayhews have not shown that the Town treated them differently from those similarly situated. See Executive 100, 922 F.2d at 1541.

For these reasons, we conclude that the Mayhews failed to prove the Town denied them equal protection under either the Texas or federal constitutions. We hold that the trial courts conclusions of law 162 and 163 concluding that the Town denied the Mayhews equal protection of the laws are incorrect. See Mercer, 715 S.W.2d at 697. Accordingly, we sustain the Towns fifth and tenth points of error.

D. Procedural Due Process Claims

In its fourth point of error and the argument under this point of error, the Town contends that the Mayhews due process claims were not ripe for review. In its eleventh point of error, the Town contends that the trial court erred in concluding that the Town deprived the Mayhews of procedural due process.

In their pleadings, the Mayhews did not allege that the Town deprived them of notice and a hearing regarding their PD application. They alleged that the vagueness of the

ordinance deprived them of procedural due process and that the Town unfairly applied standards for approval of their PD application. The trial court concluded that the Town exercised unfettered discretion in denying the PD application, applied ad hoc unwritten standards, and engaged in an unfair, procedurally unconstitutional process in reviewing the PD application. The trial court concluded this violated the Mayhews procedural due process rights. The court found the Town did not follow normal procedural practices in considering the PD application. The trial court also found the Town held numerous public workshops and hearings regarding the Mayhews PD application.

The Towns zoning ordinance provided that landowners filing PD applications were to provide the Town with information regarding traffic, population, sewer service availability, and other issues. From this information, the Town could then decide whether to grant a PD application as a variance. The Mayhews apparently contend the ordinances application was unfair because they could not look at factors the ordinance listed and know precisely whether the Town would approve their PD application.

Under their procedural due process allegations, the Mayhews did not complain of the lack of notice and a hearing, but instead asked the trial court to grant them the right to develop their property. The Mayhews procedural due process claim is coextensive with their asserted takings claim. Therefore, because this claim is based on the same state action that is the basis for their takings claim, it is subject to the same ripeness analysis. See Rocky Mountain Materials v. Board of County Commr's, 972 F.2d 309, 311 (10th Cir. 1992). The Mayhews procedural due process claim is not ripe for review for the same reasons that their takings claim is not ripe. See id; Nasierowski Bros. Inv. Co. v. City of Sterling

Heights, 949 F.2d 890, 893-94 (6th Cir. 1991); see also Herrington v. County of Sonoma, 857 F.2d 567, 569 n.1 (9th Cir. 1988), cert. denied, 489 U.S. 1090 (1989).

The central theme of procedural due process is that, if a governmental action affects a party's liberty or property rights, the party is entitled to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Anderson v. Douglas County, 4 F.3d 574, 578 (8th Cir. 1993), cert. denied, 114 5. Ct. 1059 (1994). In a zoning context, assuming a landowner has a protectable property interest, a municipality affords procedural due process when the municipality provides the landowner with notice of the proposed government action and an opportunity to be heard. Anderson, 4 F.3d at 578; Jackson Court, 874 F.2d at 1075.

We have already held that the evidence does not show that the Town deprived the Mayhews of their property. Therefore, because the Town has not deprived them of a protectable property interest, procedural due process is not necessary. See Schafer, 743 F.2d at 1089. Further, the trial court found that the Town held numerous hearings regarding the PD application.[5] This satisfies procedural due process requirements. Id.

Under their procedural due process claim, the Mayhews also appear to assert substantive due process deprivations. See Schafer, 743 F.2d at 1089. Regarding their claim that the ordinances vagueness permitted the Town to act arbitrarily and with unfettered discretion, we first note that the trial court did not declare the ordinance facially void for vagueness.[6] The Towns ordinance is not vague; it proscribes building on lots of less than one acre in designated districts. The ordinance is not so indefinite that people of common intelligence must guess at its meaning and differ as to its

application. See Jackson Court, 665 F. Supp. 1235, 1242 (E.D. La. 1987), affd, 874 F.2d 1070 (5th Cir. 1989). The fact that the Town must exercise discretion in granting variances for planned developments and that a landowner does not know precisely when the Town will grant a variance does not render the ordinance unconstitutionally vague. See Jackson, 665 F. Supp. at 1242.

The Mayhews procedural due process claim is not ripe. Even assuming ripeness, the Mayhews failed to show that the Town deprived them of procedural due process under either the federal or state constitutions. See Jackson Court, 874 F.2d at 2075; Ivey v. Edna Gladney Home, 783 S.W.2d 829, 833-34 (Tex. App.--Fort Worth 1990, no writ).

The trial court found that the Towns procedural practices were not fair and that they varied from the norm. To the extent the Mayhews stated other due process related claims in which they alleged unfairness, we will address these claims.

E. Conclusion

We addressed the Mayhews 1983 claims and claims for attorneys fees and an injunction in our May 10, 1994 opinion. Again, because of our disposition of the Mayhews claims, we need not address the Towns remaining points of error.

/s/ John Ovard Justice

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Appendix G

CAUSE NO. 87-3074-K

CHARLES MAYHEW, SR., CHARLES MAYHEW, JR., THE ESTATE OF AUDREY MAYHEW, and SUNNYVALE PROPERTIES, LTD.,	)	IN THE DISTRICT COURT
Plaintiffs,	)	
VS.	)	192ND JUDICIAL DISTRICT
THE TOWN OF SUNNYVALE,	)	
Defendant.	)	

JUDGMENT

On the 13th day of November, 1991, the above numbered cause came on to be heard. The Plaintiffs, Charles Mayhew, Sr., Charles Mayhew, Jr., the Estate of Audrey Mayhew, and Sunnyvale Properites, Ltd., appeared and by and through their representative and attorney of record announced ready for trial, and the Defendant, the Town of Sunnyvale (the "Town"_, by and through its designated representatives and attorneys of record announced ready for trial, and the parties having waived a jury, all matters of fact and things in controversy were submitted to the Court.

The Court, after hearing the evidence, the stipulations and argument of counsel, finds and declares that:

1. The Sunnyvale Zoning Ordinance (the "Ordinance"), as applied to Plaintiffs' property, is unconstitutional under the Constitution of the United States and the Constitution of the State of Texas;

2. The Town's denial of the application for development approval for the Mayhew Ranch Planned Development isunconstituional under the Constituion of the United States and the Constituion of the State of Texas;

3. Plaintiffs are prevailing parties in the above numbered cause and they are entitled to Judgment against the Town;

4. All of Plaintiffs' claims in this cause were interrelated and Plaintiffs have achieved excellent success on the merits and are entitled to fully compensatory fees;

5. As evidenced by the computerized pro formas and bills submitted by Pliantifss, the amount of time and labor spent by Plaintiffs' attorneys was reasonable and nonduplicative;

6. Plaintiffs' attorneys exercised billing judgment;

7. This case involved novel and difficult issues which were effectively presented and argued by Plaintiffs' attorneys;

8. Plaintiffs' attorneys displayed skill and great diligence in presetning these novel and difficult issues;

9. The prevailing market rates in Dallas are supported by competent testimony and affidavits;

10. Plaintiffs' attorneys gave this case priority delaying the completion of other legal work; and

11. The amount of attorneys' fees involved in this case is appropriate given the amount of damages incurred by Plaintiffs and the exceptional results obtained by Plaintiffs' counsel.

IT IS THEREFORE, ORDERED, ADJUDGED, DECREED, and DECLARED by the Court that:

12. The Town enjoined from applying one-acre zoning to Plaintiffs' property;

13. The Town is enjoined from preventing Plaintiffs or their sucessors in interest from developing Plaintiffs' property according to the application for development approval for the Mayhew Ranch Planned Development as denied by the Town Council;

14. Plaintiffs, Charles Mayhew, Sr., Charles Mayhew, Jr., the Estate of

Audrey Mayhew, and Sunnyvale Properties, Ltd., have and recover from the Town, the sum of $5,000,000.00, plus prejudgment interest in the amount of $2,301,369.20 for the period between July 12, 1987 (180 days after January 13, 1987) and the date of this Judgment;

15. Plainitffs, Charles Mayhew, Sr., Charles Mayhew, Jr., the Estate of Audrey Mayhew, and Sunnyvale Properties, Ltd., have and recover from the Town, attorneys' fees in the amount of $1,204,374.13 for services rendered through the trial and final Judgment in this case, and the further sum of $100,000 in the event of an appeal to the Court of Civil Appeals, and in the event of an appeal to the Supreme Court of Texas a further sum of $50,000 for the preparation of pleadings and briefs, plus $25,000 for preparation and participation in oral argument if writs are granted, and the further sum of $25,000 in the event of an appeal or petition for writs to the United States Supreme Court, plus an additional $75,000.00 for preparation and participation in oral arguments if writs are granted; and

16. Plaintiffs, Charles Mayhew, Sr., Charles Mayhew, Jr., the Estate of Audrey Mayhew, and Sunnyvale

Properties, Ltd., have and recover from the Town, all costs related to pursing the trial and this fianl Judgment in the amount of $175,038.14.

IT IS FURTHER ORDERED that this aard of attorneys' fees and costs is part of the Judgment hereby rendered.

IT IS FURTHER ORDERED that the Judgment hereby rendered shall bear interest at the rate of ten percent per annum from date of Judgment until final payment.

All writs and processes for the enforcement and collection of this Judgment or the cost of Court may issue as necessary. All other relief not expressly granted heredenied.

SIGNED this 17th day of February, 1992.

Appendix H

CAUSE NO. 87-3074-K

CHARLES MAYHEW, SR., CHARLES MAYHEW, JR., THE ESTATE OF AUDREY MAYHEW, and SUNNYVALE PROPERTIES, LTD.,	)	IN THE DISTRICT COURT
Plaintiffs,	)	
VS.	)	192ND JUDICIAL DISTRICT
THE TOWN OF SUNNYVALE,	)	
Defendant.	)	

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

On December 11, 1991, this Court ruled in favor of Plaintiffs and on February 17, 1992, entitled a final judgment in favor of the Plaintiffs. The Court, after consideration of the evidence presented at trial, pleadings, stipulations of the parties, and post-trial argument and briefs, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

- Plaintiffs Charles Mayhew, Sr., Charles Mayhew, Jr. and the Estate of Audrey Mayhew, are citizens of the State of Texas.

- Plaintiff Sunnyvale Properties, Ltd. is a duly organized limited partnership operating under the laws of Texas.

- Plaintiffs Charles Mayhew, Sr., Charles Mayhew, Jr., the Estate of Audrey Mayhew and Sunnyvale Properties, Ltd. (the "Plaintiffs"), are subject to the jurisdiction of this Court.

- Defendant Town of Sunnyvale (the "Town of Sunnyvale") is a Texas general law municipal corporation which is subject to the jurisdiction of this Court.

- The Town of Sunnyvale is located approximately 12 miles from the central business district of the City of Dallas.

- The Town of Sunnyvale contains approximately 10,941 acres of land.

- At least 8,190 acres of land in the Town of Sunnyvale is undeveloped.

- Existing development in the Town of Sunnyvale is made up of single family detached residences, public institutions, and a limited amount of commercial retail uses and a limited amount of light industrial development.

- In 1973, the Town of Sunnyvale amended its Zoning Ordinance to require a minimum lot area of one-acre for single family residential dwellings.

- In 1973, all residentially zoned land in the Town of Sunnyvale was zoned for single family detached dwellings.

- The minimum lot area of one-acre for single family residential dwellings was based on a recommendation of the Dallas County Health Department for the effective operation of a septic tank in the soil types prevalent in the Town of Sunnyvale.

- The one-acre provision was adopted as an interim measure until sanitary service was available in the Town of Sunnyvale.

- The Comprehensive Plan of the Town of Sunnyvale provides for a population of 25,000 persons by the year 2006, and 30,000 to 35,000 persons by the year 2016.

- Plaintiffs own approximately 1,196 acres of land in the Town of Sunnyvale.

- One-hundred and sixteen of the acres owned by Plaintiffs in the Town of Sunnyvale are located in the floodplain and are unrecoverable.

- Plaintiffs' 1,196 acres of land are for all practical purposes vacant land.

- Plaintiffs' entire tract of 1,196 acres of land is subject to a minimum one-acre lot requirement under the Zoning Ordinance of the Town of Sunnyvale.

- All residentially zoned property in the Town of Sunnyvale is subject to a minimum one-acre lot requirement under the Zoning Ordinance of the Town of Sunnyvale.

- Article XV of the Zoning Ordinance of the Town of Sunnyvale contains the only substantive standards for consideration and approval of planned developments in the Town of Sunnyvale.

- In 1985, representatives of Plaintiffs met with elected, appointed and employed officials of the Town of Sunnyvale to discuss the possible development of Plaintiffs property.

- In 1985, elected, appointed, and employed officials of the Town of Sunnyvale encouraged Plaintiffs to pursue a quality planned development of Plaintiffs' property.

- In 1985, elected, appointed and employed officials of the Town of Sunnyvale recommended that Plaintiffs include a golf course, equestrian center, open space and a "town center" in the planned development of Plaintiffs' property.

- In 1986, representatives of Plaintiffs informed elected, appointed and employed officials of the Town of Sunnyvale that a quality planned development of Plaintiffs' property was not possible given a provision of the Zoning Ordinance of the Town of Sunnyvale requiring one-acre lots for each dwelling unit in a planned development.

- The Town of Sunnyvale amended Article XV of the Zoning Ordinance of the Town of Sunnyvale in 1986 to eliminate the minimum one-acre lot requirement for planned developments, after the representatives of plaintiffs informed the Town that the one-acre minimum lot requirement prevented the planned development of Plaintiffs' property.

- In 1986, after spending more than $500,000 for experts to prepare a master plan development in accordance with the recommendations of officials from the Town of Sunnyvale and the requirements of the Zoning Ordinance of the Town of Sunnyvale, Plaintiffs submitted an application for planned development approval for the Mayhew Ranch Planned Development.

- The Mayhew Ranch Planned Development was well-planned and satisfied all of the requirements contained in Article XV and the Zoning Ordinance of the Town of Sunnyvale.

- The Mayhew Ranch Planned Development was designed by nationally recognized land planners.

- The Mayhew Ranch Planned Development was designed and prepared in accordance with sound land planning principles.

- Plaintiffs submitted all the materials required under Article XV and the Zoning Ordinance of the Town of Sunnyvale and all additional information requested by the Town of Sunnyvale in a timely fashion.

- The Town of Sunnyvale employed a professional planning and engineering firm to review the application for planned development approval for the Mayhew Ranch Planned Development.

- The professional planning and engineering firm reviewed the application of planned development approval for the Mayhew Ranch Planned Development and found that the proposed planned development satisfied each and every requirement of Article XV and the Zoning Ordinance of the Town of Sunnyvale.

- The application for planned development approval for the Mayhew Ranch Planned Development and the supplemental information submitted to the Town of Sunnyvale in support of the application demonstrate that the proposed planned development satisfied each and every

requirement of Article XV and the Zoning Ordinance of the Town of Sunnyvale.

- The Planning and Zoning Commission and the Town Council of the Town of Sunnyvale held numerous public workshops and hearings in regard to the application for planned development approval for the Mayhew Ranch Planned Development.

- The population proposed by the application for planned development approval for the Mayhew Ranch Planned Development was consistent with the population projected in the Comprehensive Plan of the Town of Sunnyvale.

- The application for planned development approval for Mayhew Ranch Planned Development proposed a range of 3,650 to 5,025 dwelling units and a mix of community-scale non-residential uses.

- Adequate steps were taken in the design of the Mayhew Ranch Planned Development to protect the public health, safety, welfare, and morals of the Town of Sunnyvale and its citizens.

- The Mayhew Ranch Planned Development was and is consistent with and would not have an adverse impact upon the public health, safety, welfare and morals of the Town of Sunnyvale and its citizens.

- The Mayhew Ranch Planned Development was and is consistent with the use regulations of the Zoning Ordinance of the Town of Sunnyvale and the requirements of Article XV.

- The Mayhew Ranch Planned Development was and is consistent with the Comprehensive Plan of the Town of Sunnyvale.

- Growth and development in the Town of Sunnyvale cannot possibly reach the populations projection in the Comprehensive Plan of the Town of Sunnyvale under the Town's one-acre zoning.

- The Mayhew Ranch Planned Development would have preserved more than 400 acres of open space in perpetuity.

- Significantly more open space would be preserved in the Mayhew Ranch Planned Development than if the vacant land in the Town of Sunnyvale were developed pursuant to the Town's one-acre zoning.

- The Mayhew Ranch Planned Development was well-planned and compatible with existing and future adjacent land uses in the Town of Sunnyvale.

- The fiscal impact of the Mayhew Ranch Planned Development on the Town of Sunnyvale and the school district would have been more beneficial than the fiscal impact of

development of the Plaintiffs' property with one-acre lots.

- Generally, residential development at three to four dwelling units has less of a fiscal impact on a municipality and school district does than does residential development at one dwelling unit per acre.

- The Mayhew Ranch Planned Development is not similar in any way to the Interstate 30 ("T-30") condominiums built by Danny Fauikner in the mid-1980's.

- No rational or sincere person would or could compare the Mayhew Ranch Planned Development with the T-30 condominiums built by Danny Fauikner.

- The development known as Creek Crossing in the East Dallas market area is similar to the Mayhew Ranch Planned Development and was a financial success.

- Plaintiffs' property is situated in a more desirable location than Creek Crossing.'

- Any residential development of the Plaintiffs' property, including the development of the Plaintiffs' property with one-acre lots, would have increased the number of school children in the Town of Sunnyvale.

- During the review of the application for planned development approval for the Mayhew

Ranch Planned Development, Plaintiffs offered to make future school and municipal sites available at cost.

- Adequate potable water was available to serve the Mayhew Ranch Planned Development.

- Adequate sanitary sewer was available to serve the Mayhew Ranch Planned Development.

- Adequate sanitary sewer was legally accessible to serve the Mayhew Ranch Planned Development.

- No rational reasonable or sincere person could conclude that sanitary sewer was a legitimate problem or an issue in connection with the Mayhew Ranch Planned Development.

- The Mayhew Ranch Planned Development posed no drainage problem, and, in fact, would have improved the existing drainage on Plaintiffs' property.

- During the review of the application of planned development approval for the Mayhew Ranch Planned Development, Plaintiffs committed to pay for all on-site costs of the development including the costs for roads, sewer and water systems.

- During the review of the application for planned development approval for the Mayhew Ranch Planned Development, Plaintiffs committed to pay their proportionate share of

all off-site costs for roads, sewer, and water systems.

- During the review of the application for planned development approval for the Mayhew Ranch Planned Development, Plaintiffs committed to contribute the monies needed for off-site water systems, which facilities would, in effect, build the core of a new water system which would benefit much of the Town of Sunnyvale.

- The Mayhew Ranch Planned Development would have increased the tax base in the Town of Sunnyvale, permitting the Town to finance any other needed infrastructure improvements.

- The Mayhew Ranch Planned Development was proposed to be developed in orderly phases.

- The Mayhew Ranch Planned Development was proposed to be built in phases consistent with market projections for the East Dallas market area which would have maximized the profitability of the development and avoided over-building of any particular type of housing.

- The Mayhew Ranch Planned Development was proposed to be built in phases which would have allowed the Town of Sunnyvale to absorb the population growth attributable to the development in a controlled manner.

- Adequate road capacity was available to serve the Mayhew Ranch Planned Development.

- Each and every required public facility or service was available, or could have been made available in a fiscally sound manner, to serve the Mayhew Ranch Planned Development.

- In reviewing the application for planned development approval for the Mayhew Ranch Planned Development, the Town of Sunnyvale varied from normal procedural practices and engaged in procedural practices that were fundamentally unfair.

- Plaintiffs and their expert consultants met with the Town Administrator and the Planning and Zoning Commission prior to submitting the application for planned development approval for the Mayhew Ranch Planned Development.

- At those meetings, Plaintiffs were encouraged by officials of the Town of Sunnyvale to pursue a quality planned development of Plaintiffs' 1,196 acre parcel of land.

- There were numerous meetings between Plaintiffs and representatives of the Town of Sunnyvale concerning the application of planned development approval for the Mayhew Ranch Planned Development.

- In December of 1986 after almost six months of review, the Town Council appointed a negotiating committee comprised of tow town councilmen, the Town Manager, and the Town

Attorney to meet with Plaintiffs to work out a compromise.

- In early January, 1987, Plaintiffs and the negotiating committee reached an agreement that the Town of Sunnyvale would approve the application for planned development approval for the Mayhew Ranch Planned Development, including a reduction to approximately 3,600 dwelling units and elimination of the proposed apartments and golf course.

- In the presence of Plaintiffs, the two councilmen who were members of the negotiating committee called a third councilmen who agreed with the compromise.

- On January 13, 1987, without warning Plaintiffs, the two councilmen who had negotiated the compromise voted to deny the application for planned development approval for the Mayhew Ranch Planned Development.

- The Town Council's decision to deny the application for planned development approval for the Mayhew Ranch Planned Development was not based on any of the criteria in Article XV or the Zoning Ordinance of the Town of Sunnyvale.

- No rational person could have concluded, and reasonable persons could not have differed, that the Mayhew Ranch Planned Development was not well-planned or that it did not satisfy each and every requirement contained in

Article XV and the Zoning Ordinance of the Town of Sunnyvale.

- No rational person could have concluded, and reasonable persons could not have differed, that the Mayhew Ranch Planned Development was contrary to the public health, safety, welfare, and morals of the Town of Sunnyvale and its citizens.

- No rational person could have concluded, and reasonable persons could not have differed, that the Mayhew Ranch Planned Development posed a problem or created an issue in terms of facilities and services in the Town of Sunnyvale.

- The Planning and Zoning Commissioner's recommendations to the Town Council of November 20, 1986 had no basis in fact and were not rational.

- The Town Council's decision to deny the application of planned development approval for the Mayhew Ranch Planned Development had no basis in fact.

- The Town of Sunnyvale takes the position that the Town has the discretion to deny an application for planned development approval even though the application demonstrates compliance with each and every requirement of Article XV.

- In denying the application for planned development approval for the Mayhew Ranch Planned Development, which satisfied each and every criteria contained in Article XV of the Zoning Ordinance of the Town of Sunnyvale, the Town of Sunnyvale exercised unfettered and unchecked discretion.

- The Town of Sunnyvale's one-acre zoning does not bear any factual relationship to valid planning principles or objectives.

- The one-acre zoning in the Town of Sunnyvale is not in conformance with the Comprehensive Plan of the Town of Sunnyvale.

- The one-acre zoning in the Town of Sunnyvale does not and will not preserve open space.

- Development in accordance with the Town of Sunnyvale's one-acre zoning and subdivision ordinance requirements will not preserve a rural and rustic environment.

- Development in accordance with the Town of Sunnyvale's one-acre zoning and subdivision requirements has resulted in and will result in development of a suburban and urban character.

- The existing development in the Town of Sunnyvale is suburban and urban and any "rural" atmosphere that exists is the result of the existence of undeveloped private property.

- Any "unique character," "relaxed living style" or "lifestyle" which exists in the Town of Sunnyvale is the result of the existence of undeveloped private property.

- Any "unique character," "relaxed living style" or "lifestyle" which exists in the Town of Sunnyvale has no factual or practical relationship to the Zoning Ordinance of the Town of Sunnyvale.

- If the Town of Sunnyvale is developed pursuant to the Zoning Ordinance of the Town of Sunnyvale and subdivision requirements, any "unique character," "relaxed living style" or "lifestyle" which presently exists would be changed.

- The one-acre zoning of Plaintiffs' property in the Town of Sunnyvale does not bear any relationship to any sanitary sewer problems that may have occurred in the past.

- The one-acre zoning in the Town of Sunnyvale has resulted in a development pattern of lot stripping and numerous curb cuts into the thoroughfares which are both dangerous as a practical matter and undesirable from a planning perspective.

- No rational person could conclude, and reasonable persons could not differ, that he one-acre zoning in the Town of Sunnyvale, as applied to Plaintiffs' property, bears any relationship to the public health, safety,

welfare, and morals of the Town of Sunnyvale and its citizens.

- F The Zoning Ordinance of the Town of Sunnyvale contains many classifications which have no foundation in fact and are wholly irrational.

- F More than one-half of the houses in the Town of Sunnyvale are located on lots of less than one-acre.

- F The Zoning Ordinance of the Town of Sunnyvale contains three different residential districts all of which require a minimum lot area of one-acre.

- F The Zoning Ordinance of the Town of Sunnyvale contains a multifamily zoning district and a duplex district, but no property in the Town of Sunnyvale is mapped in either the multifamily zoning district or the duplex district.

- F No rational person could conclude, and reasonable persons could not differ, that the classifications in the Zoning Ordinance of the Town of Sunnyvale are related to the public, health, safety, welfare and morals of the Town of Sunnyvale or its citizens.

- F In denying the application for planned development approval for the Mayhew Ranch Planned Development, the Town of Sunnyvale has refused to allow economically viable

development on Plaintiffs' property with the intention to prevent all development on Plaintiffs' land and thereby impose a servitude for the benefit of the public.

- Through its application of one-acre zoning to Plaintiffs' property, the Town of Sunnyvale has refused to allow economically viable development on Plaintiffs' property with the intention to prevent al development on Plaintiffs' land and thereby impose a servitude for the benefit of the public.

- In denying the application for planned development approval for the Mayhew Ranch Planned Development and the application for planned development approval for the Lupshire Planned Development, and in enacting numerous moratoria on applications for consideration of planned development approval, the Town of Sunnyvale has acted pursuant to an official policy not to allow development with a density of greater than one dwelling unit per acre.

- Through its application of the one-acre zoning to Plaintiffs' property, the Town of Sunnyvale has acted pursuant to an official policy not to allow development with a density of greater than one dwelling unit per acre.

- The Town of Sunnyvale has singled Plaintiffs out to bear all the costs of public preferences for the community's benefit.

- As a result of the Town Council's denial of the application for planned development approval for the Mayhew Ranch Planned Development, all economically viable use of Plaintiffs' property was denied.

- As a result of the continued application of the one-acre zoning on Plaintiffs' property, all economically viable use of Plaintiffs' property was denied.

- Prior to the Town Council's action to deny the application for planned development approval of the Mayhew Ranch Planned Development, the Plaintiffs' property had a fair market value of at least $9,700,000.00.

- The value of the Plaintiffs' property on January 13, 1987, with development approval for the Mayhew Ranch Planned Development and without the application of the one-acre zoning requirement, would have been greater than $15,000,000.00.

- As a result of the Town Council's denial of the application for planned development approval for the Mayhew Ranch Planned Development, and the continued application of the one-acre zoning, the fair market value of the Plaintiffs' property was reduced bo approximately $2,400,000.00.

- The current fair market value of Plaintiffs' property with development approval for the

Mayhew Ranch Planned Development is approximately $4,500,000.00.

- As a direct result of the Town of Sunnyvale's denial of the application for planned development approval for the Mayhew Ranch Planned Development, Plaintiffs lost opportunities to sell their property for more than $15,000,000.00.

- a. At the time of the denial of the application for planned development approval for the Mayhew Ranch Planned Development, there were buyers in the East Dallas market area who were purchasing large tracts of land with development approval.

- Prior to the denial of the application on Planned Development Approval for the Mayhew Ranch Planned Development Plaintiffs reached an agreement to sell the property subject to the grant of Planned Development Approval.

- Trammel-Crow had the economic and legal capacity to purchase the plaintiffs' property pursuant to the agreement reached with Plaintiff and would have closed but for the denial of the application Planned Development approval for the Mayhew Ranch Planned Development.

- As a direct result of the Town of Sunnyvale's application of the one-acre zoning to Plaintiffs' property, Plaintiffs lost opportunities to sell their property for more than $15,000,000.00.

- Since 1973, the average number of building permits issued by the Town of Sunnyvale for development of homes on one-acre or greater lots was approximately eight units per year.

- There is no market for one-acre lots, on the Plaintiffs' property beyond 8 lots per year.

- The minimum residential density necessary for economic viability on Plaintiffs' property is approximately 3,600 dwelling units or three dwelling units per acre.

- Development under the R1, R2, R3, multifamily, and duplex districts on Plaintiffs' property is not economically viable.

- Agriculture is not an economically viable use of Plaintiffs' property.

- No knowledgeable investor would purchase Plaintiffs' property as it is currently zoned.

- No knowledgeable investor would purchase Plaintiffs' property to hold it for future development potential in the hopes that some day in the future the one-acre zoning in the Town of Sunnyvale might be changed.

- The Town Council's decision to deny the application for planned development approval for the Mayhew Ranch Planned Development has the practical effect of depriving Plaintiffs of the only economically viable use of their property.

- The result of the Town Council's decision to deny the application for planned development approval for the Mayhew Ranch Planned Development is to destroy the value of Plaintiffs' property.

- As a direct result of the denial of the application for planned development approval for the Mayhew Ranch Planned Development, Plaintiffs experienced damages in excess of $5,000,000.00.

- When the Complaint in this cause was filed on March 6, 1987, a moratorium on consideration of applications for planned development approval was still in effect.

- When the Town Council voted to deny the application for planned development approval for the Mayhew Ranch Planned Development, a moratorium on consideration of any additional applications for planned development approval became effective against Plaintiffs' property.

- Subsequent to the denial of the application for planned development approval for the Mayhew Ranch Planned Development, an adjacent

property owner submitted an application for planned development approval for the Lupshire Planned Development on approximately 1100 acres of land adjacent to Plaintiffs' property.

- A professional planner hired to review the application for planned development approval for the Lupshire Planned Development determined that the proposed planned development satisfied the requirements of Article XV and the Zoning Ordinance of the Town of Sunnyvale and recommended that the Town Council approve the proposed development.

- During the Town of Sunnyvale's review of the application for planned development approval for the Lupshire Planned Development the proposed density was reduced to one and six-eighths dwelling units per acre, or 1,850 dwelling units on 1100 acres.

- The Town Council of the Town of Sunnyvale voted unanimously to deny the application for planned development approval for the Lupshire Planned Development.

- The Town Council had the authority to approve the Mayhew Ranch Planned Development with conditions, including a condition of a lower density.

- The Town of Sunnyvale considered and rejected countless alternative densities during

the consideration of the application for Planned Development Approval for Mayhew Ranch Planned Development permutations to the density originally proposed by Plaintiffs.

- The actions of the Town of Sunnyvale reveal a pattern and practice which demonstrates the intent of the Town of Sunnyvale to deny any application for development approval with a density greater than one dwelling unit per acre.

- Plaintiffs have exhausted all of the possible remedies and avenues of relief which were realistically available to them in the Town of Sunnyvale.

- The Town of Sunnyvale has closed the door on future reapplications by Plaintiffs at a realistic or economically viable density.

- Injunctive relief prohibiting the Town of Sunnyvale from enforcing the one-acre zoning on Plaintiffs' property and enjoining the Town of Sunnyvale from interfering with the development as proposed by the application for planned development approval for the Mayhew Ranch Planned Development is necessary to ensure that the Town of Sunnyvale does not continue to abrogate Plaintiffs' constitutionally protected rights.

- Injunctive relief is necessary because the money judgment awarded to Plaintiffs is not

adequate to compensate them for their losses without the injunction.

- The litigation between Plaintiffs and the Town of Sunnyvale spanned nearly five years during which Plaintiffs incurred attorneys' fees and costs.

- All of Plaintiffs' claims in this cause were interrelated and Plaintiffs have achieved excellent success on the merits and are entitled to fully compensatory fees.

- The amount of time and labor spent by Plaintiffs' attorneys was reasonable and nonduplicative.

- Plaintiffs' attorneys exercised billing judgment and either did not bill or eliminated hours from their bills which were unnecessary or duplicative.

- This case involved novel and difficult issues which were effectively presented and argued by Plaintiffs' attorneys.

- Plaintiffs' attorneys displayed skill and great diligence in presenting these novel and difficult issues.

- The prevailing market rates in Dallas were supported by competent testimony and affidavits submitted by Plaintiffs.

- Plaintiffs' attorneys gave this case priority delaying the completion of other legal work.

- The amount of attorneys' fees involved in this case is appropriate given the amount of damages incurred by Plaintiffs and the exceptional results obtained by Plaintiffs' counsel.

- Pre-judgment and post-judgment interest are necessary to fully compensate Plaintiffs.

CONCLUSIONS OF LAW

- The proposed Mayhew Ranch Planned Development was in conformance with the Comprehensive Plan of the Town of Sunnyvale.

- The one-acre zoning in the Town of Sunnyvale is not in conformance with the Comprehensive Plan of the Town of Sunnyvale.

- Unsupported concerns expressed through the "hue and cry" of the citizens of the Town of Sunnyvale are not a valid basis for the exercise of the police power in accordance with the public, health, safety, welfare and morals.

- Adequate sanitary sewer was legally accessible to serve the Mayhew Ranch Planned Development.

- Plaintiffs' have a property right to be free from unconditional zoning ordinances and decisions affecting the private use of their property.

- Plaintiffs have a property right to be free from arbitrary and capricious zoning ordinances and decisions affecting the private use of their property.

- Plaintiffs have a property right to an economically viable use of their property.

- The Town of Sunnyvale exercised unfettered discretion under Article XV and the Zoning Ordinance of the Town of Sunnyvale in denying the application for planned development approval for the Mayhew Ranch Planned Development and violated Plaintiffs' rights to procedural due process under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 19 of the Constitution of the State of Texas.

- In denying the application for planned development approval for the Mayhew Ranch Planned Development, the Town of Sunnyvale applied ad hoc unwritten standards and engaged in an unfair and procedurally unconstitutional process in reviewing the application for planned development approval in violation of Plaintiffs' rights to procedural due process under the Fifth and Fourteenth Amendments to the Constitution of the United

States and Article I, Section 19 of the Constitution of the State of Texas.

- The denial of the application for planned development approval for the Mayhew Ranch Planned Development which satisfied each and every requirement in Article XV and the Zoning Ordinance of the Town of Sunnyvale had no basis in fact.

- No reasonable person could have concluded, and reasonable persons could not have differed, that the denial of the application for planned development approval for the Mayhew Ranch Planned Development bore a substantial relationship to the public health, safety, and welfare of the Town of Sunnyvale and its citizens.

- The denial of the application for planned development approval for the Mayhew Ranch Planned Development did not and does not bear a substantial relationship to the public health, safety, welfare, and morals, is arbitrary and capricious, and violated Plaintiffs' rights to substantive due process under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 19 of the Constitution of the State of Texas.

- There is no rational relationship between the application of the Town of Sunnyvale's one-acre zoning to Plaintiffs' property and a legitimate public interest in the public health,

safety, welfare and morals of the Town of Sunnyvale and its citizens.

F No rational person could have concluded, and reasonable persons could not have differed, that the Town of Sunnyvale's one-acre zoning, as applied to Plaintiffs' property, serves a legitimate public interest in the public health, safety, welfare, and morals of the Town of Sunnyvale and its citizens.

F The application of the Town of Sunnyvale's one-acre zoning to Plaintiffs' property did not and does not bear a substantial relationship to the public health, safety and welfare, is arbitrary and capricious, and violates Plaintiffs' rights to substantive due process under the Fifth and Fourteenth Amendments to the Constitutional of the United States and Article I, Section 19 of the Constitution of the State of Texas.

F Plaintiffs' property is subject to one-acre zoning and such classification bears no rational relationship to a legitimate public purpose.

F The application of the Town of Sunnyvale's one-acre zoning to Plaintiffs' property does not serve and does not have a rational relationship to a legitimate public purpose and denies Plaintiffs equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3 of the Constitution of the State of Texas.

- No rational person could conclude, and reasonable persons could not differ, that the classifications in the Zoning Ordinance of the Town of Sunnyvale are rationally related to a legitimate public purpose.

- The practical effect of the Town Council's decision to deny the application for planned development approval for the Mayhew Ranch Planned Development and continued enforcement of the one-acre minimum lot requirement on Plaintiffs' property is to deprive Plaintiffs of due process of law in that the public interest does not require the limitation on the use of Plaintiffs' property and the regulations are not reasonable necessary for the accomplishment of any legitimate public purpose.

- The result of the Town Council's decision to deny the application for planned development approval for the Mayhew Ranch Planned Development is to convert Plaintiffs' property to a public use without payment of just compensation during the period the unwarranted and unconstitutional one-acre lot minimum remains in effect.

- The result of the Town Council's decision to deny the application for planned development approval for the Mayhew Ranch Planned Development is to destroy the value of Plaintiffs' property, leaving it with no

economically viable use so as to constitute a taking without just compensation.

- The Town of Sunnyvale has refused to allow economically viable development on Plaintiffs' property with the intent to prevent all development on Plaintiffs' land and thereby impose a servitude for the benefit of the public without just compensation in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 17 of the Constitution of the State of Texas.

- The actions of the Town of Sunnyvale reveal a pattern and practice which demonstrates the intent of the Town of Sunnyvale to deny any application for development approval with a density greater than one dwelling unit per acre, in contravention of its own Comprehensive Plan and Zoning Ordinance of the Town of Sunnyvale.

- The denial of the application for planned development approval for the Mayhew Ranch Planned Development deprives Plaintiffs of an economically viable use which cost, in justice and fairness, should be borne by the community at large and constitutes a taking without payment of just compensation under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 17 of the Constitution of the State of Texas.

- The application of the Town of Sunnyvale's one-acre zoning to Plaintiffs' property deprives Plaintiffs of an economically viable use which cost, in justice and fairness, should be borne by the community at large and constitutes a taking without payment of just compensation under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 17 of the Constitution of the State of Texas.

- The denial of the application for planned development approval for the Mayhew Ranch Planned Development does not substantially advance a legitimate state interest and constitutes a taking without payment of just compensation under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 17 of the Constitution of the State of Texas.

- The application of the Town of Sunnyvale's one-acre zoning to Plaintiffs' property did not and does not substantially advance a legitimate state interest and constitutes a taking without payment of just compensation under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 17 of the Constitution of the State of Texas.

- In denying the application for planned development approval for the Mayhew Ranch Planned Development, the Town of Sunnyvale has subjected Plaintiffs to a denial of their

rights as secured by the Constitution of the United States under color of state law.

- Through the application of the one-acre zoning to Plaintiffs' property, the Town of Sunnyvale has subjected Plaintiffs to a denial of their rights as secured by the Constitution of the United States under color of state law.

- In denying the application for planned development approval for the Mayhew Ranch Planned Development and the application for planned development approval for the Lupshire Planned Development, and in enacting numerous moratoria on consideration of applications for planned development approval, the Town of Sunnyvale has acted pursuant to an official policy not to permit development of greater than one dwelling unit per acre in the Town of Sunnyvale and has violated Plaintiffs' rights under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 3, 17, and 19 of the Constitution of the State of Texas.

- The application of the one-acre zoning to Plaintiffs' property in the Town of Sunnyvale is an official policy which has violated Plaintiffs' rights under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 3, 17 and 19 of the Constitution of the State of Texas.

- The Town of Sunnyvale's denial of the application for planned development approval for the Mayhew Ranch Planned Development is a constitutional tort for which Plaintiffs are entitled to relief under 42 U.S.C. § 1983.

- The application of the one-acre zoning to Plaintiffs' property by the Town of Sunnyvale is a constitutional tort for which Plaintiffs are entitled to relief under 42 U.S.C. § 1983.

- Plaintiffs are prevailing parties under 42 U.S.C. § 1983 and have achieved excellent success on the merits.

- As a result of the decision of the Town Council of Defendant Town of Sunnyvale to deny the application for planned development approval for the Mayhew Ranch Planned Development and the resulting continued application of the one-acre zoning on Plaintiffs' property, Plaintiffs have suffered injury and loss in excess of $5,000,000.00.

- The money judgment of $5,000,000.00, plus pre-judgment and post-judgment interest, is necessary to compensate the Plaintiffs for the Town of Sunnyvale's violation of their constitutional rights to due process and equal protection under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 3 and 19 of the Constitution of the State of Texas.

- F The money judgment of $5,000,000.00, plus pre-judgment and post-judgment interest, is necessary to compensate Plaintiffs for the Town of Sunnyvale's uncompensated taking of their property under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 17 of the Constitution of the State of Texas.

- F The money judgment of $5,000,000.00, plus pre-judgment and post-judgment interest, is necessary to compensate Plaintiffs for the constitutional torts committed against Plaintiffs by the Town of Sunnyvale under 42 U.S.C. § 1983.

- F The money judgment of $5,000,000.00, plus pre-judgment and post-judgment interest, is inadequate to compensate Plaintiffs as a matter of law.

- F Injunctive relief prohibiting the Town of Sunnyvale from enforcing the one-acre zoning on Plaintiffs' property and enjoining the Town of Sunnyvale from interfering with the development as proposed by the application for planned development approval for the Mayhew Ranch Planned Development is necessary to ensure that the Town of Sunnyvale does not continue to abrogate Plaintiffs' constitution ally protected rights.

- F Plaintiffs have exhausted all of the possible remedies and avenues of relief which were

realistically available to them in the Town of Sunnyvale.

- The Town of Sunnyvale has closed the door on future reapplications by Plaintiffs at a realistic or economically viable density thus rendering the possibility of reapplication futile.

- Reapplication by Plaintiffs for planned development approval with Defendant Town of Sunnyvale would have been, and still is, futile.

- When the Town Council considered the application of planned development approval for the Mayhew Ranch Planned Development, the Town Council had the authority to and did consider and reject each and every level of density between one and four and two-tenths dwelling units per acre.

- This case was ripe for adjudication.

SIGNED this 11 day of March, 1992.

/s/ Judge Merrill Hartman

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Proposed Findings of Fact and Conclusions of Law was served by Federal Express and by mail through the United States Postal Service to the attorneys listed below, this 9th day of March, 1992.

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